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Criminal Law - Insanity - Burden of Proof

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forced to choose between the two. Either the privilege or the duty must yield, and it is preferable in balancing conflicting values to make inroads into the privilege than to abrogate the duty. It is submitted that the instant decision is not only justified, but necessitated by the high station of the attorney and his relationship to the courts. If attorneys are to retain the confidence of the public, they must conduct their affairs in a manner which would justify such confidence, or, failing to do so, be removed from the profession.

John Schwab II

CRIMINAL LAW — INSANITY — BURDEN OF PROOF

Defendant was charged with murder. As a defense defendant pleaded insanity at the time of the commission of the crime.[1] During the voir dire examination of prospective jurors, the trial judge sustained an objection by the state to a statement made by defense counsel concerning the degree of proof required where insanity is urged as a defense. In so doing, the judge stated: "[M]y idea is that the defense is required to prove insanity not only by a preponderance of evidence but beyond a reasonable doubt of *insanity,* not reasonable doubt of sanity."[2] (Emphasis added.) At the time this statement was made five jurors had been accepted, and four of the five then being examined eventually served. On appeal to the Louisiana Supreme Court, *held,* reversed. Where insanity is urged as a defense to a criminal charge the defendant need only prove his insanity by a preponderance of the evidence.[3] *State v. Stewart,* 117 So.2d 583 (La. 1960).

1. Defendant also pleaded present insanity, but the court did not consider this issue.

2. State v. Stewart, 117 So.2d 583, 584 (La. 1960).

3. In the instant case the Supreme Court stated that an erroneous statement of law made by the trial judge which is prejudicial vitiates the verdict and entitles the accused to a new trial even though the judge subsequently charges the correct law. State v. Langford, 133 La. 120, 62 So. 597 (1913) was cited by the court. In addition, the court stated that an erroneous instruction cannot be cured by another instruction unless the erroneous instruction is expressly admitted to be such and formally withdrawn from the jury by the trial judge, citing State v. Jones, 36 La. Ann. 204 (1884). It is interesting to note that in the instant case the judge instructed the jury erroneously in the charge as well as on the voir dire. The charge given was: "After you have weighed and given credit to the evidence on both sides of the question if you still entertain a reasonable doubt that this defendant is insane the defendant should be held by you to be sane." Record, vol. 7, p. 1989. A bill of exception was taken to parts of the instruction, but the bill did not include the above language. It would seem that had the language been included, the Supreme Court could have rested its decision on this more direct ground rather than on statements made by the judge on voir dire.

In American jurisdictions, three rules have been applied concerning the burden of proof as to the defense of insanity at the time of the crime, to wit: (1) the defendant must prove beyond a reasonable doubt that he was insane;[4] (2) the defendant must satisfy the jury of insanity by a preponderance of the whole evidence in the case;[5] (3) if, upon the whole evidence, there be reasonable doubt that the defendant was sane, he should be acquitted.[6] The rule which requires the defendant to prove his insanity beyond a reasonable doubt was first enunciated in 1812 on the trial of Bellingham.[7] Courts which applied this rule did so on the theory that since the state is required to negative the presumption of innocence beyond a reasonable doubt, the defendant should be required to negative the presumption of sanity beyond a reasonable doubt.[8] The English courts rejected this rule and accepted the preponderance of the evidence rule at least as early as 1843 in *M'Naghten's* case.[9] The beyond a reasonable doubt rule was applied in some of the earlier cases in this country, but was later rejected.[10] The second rule, which requires the defendant to prove his defense of insanity by a preponderance of the evidence, is applied by twenty-two states,[11]

4. State v. Garver, 190 Ore. 291, 225 P.2d 771 (1950). This case is based on a statute which has since been amended. Thus Oregon, the last proponent of this rule, has rejected it. See note 9 *infra*.

5. State v. Chinn, 229 La. 984, 87 So.2d 315 (1956).

6. Davis v. United States, 160 U.S. 469 (1895).

7. This case is unreported. Reference to it was made in 1 COLLINSON, A TREATISE OF THE LAW CONCERNING IDIOTS, LUNATICKS (*sic*) AND OTHER PERSONS NON COMPOTES (*sic*) MENTIS 636 (1812), which was cited in HALL, PRINCIPLES OF CRIMINAL LAW 480 (1947). This case was also referred to in State v. Lyons, 113 La. 959, 37 So. 890 (1904).

8. State v. Spencer, 21 N.J.L. 196 (1846).

9. 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). See State v. Lyons, 113 La. 959, 37 So. 890 (1904), in which the court stated that the *M'Naghten* case is generally accepted as the foundation case of the preponderance of the evidence rule, although this rule may have been applied before this decision.

10. The rule was applied early in the United States in State v. Spencer, 21 N.J.L. 196 (1846), but the New Jersey court in Graves v. State, 46 N.J.L. 203 (1883) applied the preponderance of the evidence rule. The disposal of this rule by the New Jersey court, one of the first jurisdictions to employ it, is typical of the treatment which the rule has received in American jurisdictions. Oregon applied this rule until 1957, when the statute requiring the rule was amended. ORE. REV. STAT. § 136.390 (1953): "*Insanity at time of commision of act as a defense.* When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved beyond a reasonable doubt." Amended in 1957 to read: "*Insanity at time of commission of act as a defense.* When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence."

11. MODEL PENAL CODE § 4.03, Comment (Tent. Draft No. 4, 1955). The number of states following this rule is listed as being twenty-one. However, since this draft was published Oregon amended its statute requiring proof of insanity beyond a reasonable doubt. Oregon now requires the defendant to prove insanity by a preponderance of the evidence. Hence, twenty-two states follow this rule.

including Louisiana. An alternative statement of the rule, often used by the courts, is that the defendant must prove insanity to the satisfaction of the jury, for a preponderance of the evidence is recognized as that of a character to satisfy the mind, although it be not free from reasonable doubt.[12] The third rule, which requires acquittal when the defendant raises a reasonable doubt as to his sanity, is applied in twenty-one states, the federal courts, and the District of Columbia.[13] The rationale of this rule is that sanity is an essential element of the crime. Consequently, as all of the elements of the crime must be proven beyond a reasonable doubt, an acquittal must result whenever a reasonable doubt as to sanity is raised.[14]

In *State v. De Rance*,[15] decided in 1882, the Louisiana Supreme Court veered from its prior use of the preponderance of the evidence rule[16] and applied the early English rule requiring the defendant to prove insanity beyond a reasonable doubt. However, in 1897, the Supreme Court in *State v. Scott*[17] reverted to the preponderance of evidence rule. In the instant case the trial judge relied upon the *De Rance* case. In reversing the trial judge the Supreme Court referred to the *Scott* case and stated that the burden is on the defendant to show by clear and convincing proof the insanity he urges as a defense. Following this position, the presumption of sanity is to be taken into consideration, along with all the testimony before the jury, whether produced by the accused or by the state. If on consideration of the whole case the jury is satisfied that the defendant was not sane when the act charged was committed, then he is to be acquitted. This decision, in following the preponderance of the evidence rule, maintains the consistency in the jurisprudence of the state since the *Scott* decision.

The rule applied by the Louisiana Supreme Court is both analytically and practically sound. The rule that the defendant must prove his insanity beyond a reasonable doubt is unsatisfactory in that it places on the defendant a burden of proving something which is not usually susceptible of such conclusive proof, especially where the insanity is not continuing. On the other extreme, a rule that acquittal is required where the defendant

12. State v. Scott, 49 La. Ann. 253, 21 So. 271 (1897).
13. MODEL PENAL CODE § 4.03, Comment (Tent. Draft No. 4, 1955).
14. Davis v. United States, 160 U.S. 469 (1895).
15. 34 La. Ann. 186 (1882).
16. State v. Coleman, 27 La. Ann. 691 (1875); State v. Burns, 25 La. Ann. 302 (1873).
17. 49 La. Ann. 253, 21 So. 271 (1897).

creates a reasonable doubt as to his mental capacity is also unsatisfactory. This rule treats sanity as a part of the criminal intent, or mens rea, and thus as a necessary element of the crime. However, mental capacity and criminal intent, as a general rule, are not one and the same thing.[18] Criminal intent involves the question of whether the defendant actively desired (specific intent) or could be expected to know (general intent) that certain consequences would result from his act, whereas the test of insanity as applied in Louisiana and other jurisdictions essentially deals with whether the defendant appreciated the wrongness of his conduct. The existence of insanity should only be considered as an affirmative defense for urging the lack of criminal responsibility when both the facts relative to the commission of the proscribed conduct and the requisite intent element have been established.[19] In addition, as a practical matter the second rule is preferable to the third because the latter disregards the presumption of sanity and places the burden on the state to establish the defendant's sanity after only "some evidence"[20] of insanity has been presented by the defense.[21] In effect the state is required to prove beyond a reasonable doubt that the mental condition of the defendant was in fact that which society initially presumed it to be. Also, the defendant is certainly in a better position to prove his insanity than is the state to prove his sanity.

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CRIMINAL LAW — THE FELONY MANSLAUGHTER DOCTRINE IN LOUISIANA

Defendant attempted to kill a bartender with a knife and the bartender fired a pistol in self-defense. The bullet from the pistol struck and killed a customer sitting at the bar. Defendant

18. It would seem that the only instance in which insanity should be treated as an element of the crime is, as in voluntary intoxication, where its presence precludes the possibility of any intent. Generally, voluntary intoxication is no defense, but it may preclude the presence of a specific intent or knowledge, which is an element of a crime, when the defendant is so intoxicated that he could not possibly desire or know that certain consequences will result from his act. Similarly, if the defendant is so insane that he cannot desire or know that certain consequences will result from his act, then he lacks criminal intent. However, this insanity must be an extreme case, possibly bordering on the old wild beast classification. Practically, such a person will not be brought to trial, and this exception is more in the realm of theoretical speculation than in reality.

19. State v. Surrency, 148 La. 983, 88 So. 240 (1921).

20. 9 WIGMORE, EVIDENCE § 2491(2) (3d ed. 1940).

21. *Id.* §§ 2485-2491, 2497.