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One Year Review of Evidence

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ONE YEAR REVIEW OF EVIDENCE

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I. CRIMINAL CASES

In *Garrison v. People*[1] the petitioner was tried, convicted of murder, and sentenced to death. A plea of not guilty by reason of insanity had been entered, but a finding of sanity was returned. The conviction and sentence were affirmed by the supreme court.[2] A few days before execution, Garrison filed a petition in the trial court, with physician's affidavit attached, alleging that he was then insane and had become so since the date on which judgment was entered. Execution was stayed and a psychiatrist was appointed to examine him. At a subsequent jury trial a finding of sanity was entered to which Garrison filed a writ of error.

The assigned error was that the trial court excluded all evidence of the appellant's mental condition prior to January 20, 1960, the date on which the original judgment and sentence were pronounced. Garrison's contention was that the court, relying on language in *Leick v. People*,[3] excluded this evidence *solely* because it antedated the imposition of sentence. Appellant urged that such evidence was admissible, not to show mental condition at or before the time of sentence, but to throw light on his true mental condition at the time of the postsentence sanity trial. His mental illness, he insisted, was hereditary and he sought to introduce a full family history to show that his mental condition was " the logical culmination of a long, drawn-out process of mental deterioration."[4]

The supreme court quoted the language from *Leick* that "The sole and only issue to be determined . . . was the defendant's sanity or lack thereof occurring subsequent to conviction and sentence in the criminal action."[5] This language, the court held, was not "tantamount to a declaration that any and all evidence of the mental condition of the defendant prior to 'conviction and sentence in the criminal action', however relevant it may be to his present mental state, is inadmissible solely because it occurred prior to such date."[6]

In arriving at its final conclusion the court relied on an American Jurisprudence passage[7] and said:

> [I]f evidence of the general type alluded to, supra, is otherwise competent, relevant and material, it is not inadmissible solely because it occurred prior to the time judgment and sentence entered in the criminal proceeding, or because it relates to his mental condition prior to such time . . . .[8]

The opinion admitted that the Am. Jur. section presupposes an insanity plea relating to the time of the commission of the crime and not to one interposed after sentence but said that "in logic there is no valid reason for applying a different rule where the issue is

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1 378 P.2d 401 (Colo. 1963).
2 Garrison v. People, 147 Colo. 385, 364 P.2d 197 (1961).
3 140 Colo. 564, 345 P.2d 1054 (1959).
4 378 P.2d at 403.
5 140 Colo. at 568, 345 P.2d 1054, 1056.
6 378 P.2d at 403.
7 20 Am. Jur. *Evidence* § 349 (1939). See 378 P.2d at 403, 404.
8 378 P.2d at 404.

whether a person 'has become and remains' insane since the imposition of sentence. In either event the ultimate issue is the sanity, or lack of it, of a particular individual as of a date certain."[9]

It is no doubt true that the trauma of sentence and impending execution may react on a pre-existing mental condition and cause postsentence insanity. The propriety of the decision, therefore, cannot be argued. The court might have, however, found sounder legal principles on which to base its opinion. Two fairly recent Pennsylvania decisions are in point. The first, *Commonwealth v. Gossard*,[10] held that in determining the petitioner's mental condition at post-

9 *Ibid.*
10 385 Pa. 312, 123 A.2d 258 (1956).

sentence proceedings, the evidence at the murder trial as well as the entire life record of the petitioner may be considered. The second, *Commonwealth v. Ballem*,[11] held that the language in *Gossard* was not mandatory, but consideration of the prior life record was at least discretionary.

Stretching the Am. Jur. quotation to meet the needs of this case is unnecessary in light of the statutory tests of insanity in Colorado. The "right-wrong plus irresistable impulse"[12] test is used to determine criminal insanity at the time of the commission of the wrongful act, while the postsentence test is whether the prisoner has "sufficient intelligence to understand the proceedings, the purpose of his punishment and the impending fate awaiting him."[13] Certainly, an adjudication of sanity based on the right-wrong, irresistable impulse test should not be, in effect, res judicata as to the "intelligence" test.

The differences in the amount and burden of proof required in the two sanity trials might provide further basis for the decision. At the initial trial the prosecution has the burden of proving *sanity* beyond a reasonable doubt[14] after the defense has raised the issue with *some* evidence. At the postsentence sanity trial the petitioner has, by statute, the burden of proving his insanity by a preponderance of the evidence.[15] It is clear that since the burden of proof is on the prosecution in the first instance, the full mental history of the defendant may not, or need not, be presented at that trial by the defense. In addition, since the postsentence sanity trial is discretionary,[16] an affidavit of a psychiatrist usually accompanies the petition to convince the judge of the validity of the alleged insanity. In preparing his findings the psychiatrist must utilize the individual's full life history. To allow a sanity trial based on such affidavit and then to exclude much of the material on which it was based is inconsistent. The foregoing discussion could, it is suggested, bulwark the opinion of the court.

The question of what evidence is admissible at a postsentence sanity trial is not one-sided. The opposing argument is based on the following:

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11 391 Pa. 626, 139 A.2d 534 (1958).

12 Colo. Rev. Stat. § 39-8-1(2) (1953). "The applicable test of insanity in such cases shall be, and the jury shall be so instructed: 'A person who is so diseased in mind at the time of the act as to be incapable of distinguishing right from wrong with respect to that act, or being able so to distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, is not accountable; and this is true howsoever such insanity may be manifested, whether by irresistable impulse or otherwise. But care should be taken not to confuse such mental disease with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law.' "

13 Colo. Rev. Stat. § 39-8-6(8) (1953). ". . . [W]hen the issue is whether the defendant has become insane since judgment and sentence, and the punishment is death, the following shall be the applicable test, and the jury shall be so instructed: 'The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature of the proceeding against him, the charge of which he was convicted, the purpose of his punishment, and the impending fate which awaits him, and has sufficient mind to know any facts which would make his punishment unlawful and to communicate such facts to his attorney or to the court.' "

14 Leick v. People, 136 Colo. 544, 322 P.2d 674 (1956); Martz v. People, 114 Colo. 278, 162 P.2d 408 (1945); Arridy v. People, 103 Colo. 29, 82 P.2d 757 (1938); Graham v. People, 95 Colo. 544, 38 P.2d 87 (1934); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

15 Colo. Rev. Stat. § 39-8-6(7) (1953). "The trial of the issue of sanity or insanity of the defendant in this section shall be deemed a civil proceeding, and the jury shall consist of twelve persons . . . . When the issue is whether the defendant has thus become and then is insane, the burden shall be upon the defendant to prove by a preponderance of the evidence insanity at the time and as occurring since the commission of the offense, or since the verdict of guilty, or since the judgment, as the case may be. . . . " See Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959).

16 Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959); Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951); Bulger v. People, 61 Colo. 187, 156 Pac. 800 (1910).

> Sanity of an accused at the time he committed the offense is conclusively determined by the judgment of conviction and it cannot be again raised in a proceeding to determine the question of his sanity before execution of a capital sentence on him. Accordingly, the only questions for trial are whether the accused has become insane or a lunatic since the entry of the original judgment and whether he is insane or a lunatic at the time of the present proceeding; and since the judgment of conviction conclusively raises a presumption of sanity at the time of the offense, the burden is on the accused to show by a preponderance of evidence that he has become insane subsequent to the final judgment and before execution.[17]

Strict interpretation of this passage and the statutory requirement that it must be specifically pleaded that the insanity arose after the imposition of sentence leads to the supposition that the evidence at trial should be restricted.[18] Of the arguments, however, those favoring the liberal admission of evidence appear to be more plausible in the light of modern psychiatric concepts.

Another 1963 case, *Coppinger v. People*,[19] strongly reiterated that under the Colorado Habitual Criminal Act[20] certified copies of prior convictions are insufficient to prove such convictions. The statute demands authenticated copies and the court will accept no less. The opinion pointed out that what constitutes an authenticated copy was stated explicitly in *Brown v. People*[21] and that the "additional certificates of authenticity by the judge . . . and . . . the clerk . . . are essential before the documents may be received under the statute."[22] There can be no question now about the standard of proof required, unless the defendant admits his identity and the former convictions.[23]

The major issue on appeal in *Johnson v. People*[24] was the denial by the trial court of a motion to quash a robbery information under the doctrine of *autrefois acquit*.[25] A subsidiary element, but one of importance to Colorado law, was the admission into evidence of the first-trial testimony of a witness who refused to testify at the second trial. Colorado has heretofore adopted the rule of admissibility of such testimony when the witness whose testimony was sought was deceased or otherwise unavailable and the defense had had an opportunity to cross-examine the witness at the first trial.[26] But in *Johnson* the witness was available.

Looking to other jurisdictions, the court adopted the rationale of a Kansas case[27] and held that the true test "was not so much the

17 24 C.J.S. Criminal Law § 1618 (1961).

18 See People v. Eldred, 103 Colo. 334, 86 P.2d 248 (1938). The entire Colorado law of insanity is discussed in: Cohen, "Insanity and the Law: Toward a Rational Development of Criminal Responsibility," 39 *Dicta* 325 (1962).

19 380 P.2d 19 (Colo. 1963).

20 Colo. Rev. Stat. § 39-13-2 (1953). "Evidence of former convictions. — On any trial under the provisions of this article, a duly authenticated copy of the record of former convictions and judgments of any court of record for any of said crimes against the party indicted or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party."

21 124 Colo. 412, 238 P.2d 847 (1951).

22 380 P.2d at 20.

23 Hackett v. Tinsley, 143 Colo. 203, 352 P.2d 799 (1960).

24 384 P.2d 454 (Colo. 1963).

25 This issue is discussed in this year's "One Year Review of Constitutional Law," *supra* page 77.

26 Henwood v. People, 57 Colo. 544, 143 Pac. 373 (1914); Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913).

27 State v. Stewart, 85 Kan. 404, 116 Pac. 489 (1911).

'unavailability' of the witness, but the 'unavailability' of his testimony and that a witness who—though present—refused to testify is just as surely 'unavailable' as the witness who stepped across a state line to avoid service of a subpoena."[28] The decision on this point has further support from case law and secondary authority.[29] Under the general rule the first-trial testimony is admitted when the witness is present but claims a privilege not to testify.[30] The Colorado law, on the basis of *Johnson*, goes one step further and allows the use of the testimony when the witness does not claim any privilege, but merely refuses to testify. If it so desires, the court may limit this decision in the future since in *Johnson* the witness was serving a life sentence in the penitentiary and the trial court was "handicapped as to the possible punishment which it could impose under its contempt powers for his refusal to testify."[31]

II. CIVIL CASES

The use of blood test results to overcome the presumption of legitimacy was the subject of *Beck v. Beck*.[32] On the basis of a blood test, taken after the trial pursuant to agreement made before trial, the lower court granted judgment *n.o.v.*, and the mother brought a writ of error. In the opinion, the court recognized that the presumption of legitimacy is one of the strongest presumptions known to the law and can be overcome only by proof of non-access or impotency of the husband,[33] but cited a Massachusetts case which held that the rule does not require proof on either ground to a degree of impossibility.[34] The court quoted from the Colorado blood test statute[35] and gave this interpretation:

> As we read the statute a reputed father is entitled as a matter of right to have such tests made; he is further entitled to have the tests received in evidence when definite exclusion is established, provided a proper foundation is laid for the introduction of such evidence. The words 'may be received in evidence' in the act must have that effect if they are to be meaningful.[36]

The evidence of the tests so admitted is competent to overcome the presumption of legitimacy.[37] This is the general rule in jurisdictions having a statute similar to Colorado's.[38]

Nelson v. Grissom[39] concerned a dispute about whether a mother who had full custody of two minor children, subject to the father's visitation rights, could take the children to California to live in a

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28 384 P.2d at 457.
29 People v. Picket, 339 Mich. 294, 63 N.W.2d 681 (1954). See 20 Am. Jur. *Evidence* §§ 686-706 (1939); 15 A.L.R. 495 (1921); 45 A.L.R.2d 1354 (1956).
30 See 45 A.L.R.2d 1354 (1956).
31 384 P.2d at 457.
32 384 P.2d 731 (Colo. 1963).
33 Lanford v. Lanford, 377 P.2d 115 (Colo. 1962).
34 Commonwealth v. Kitchen, 299 Mass. 7, 11 N.E.2d 482 (1937).
35 Colo. Rev. Stat. § 52-1-27 (Perm. Supp. 1960). "Blood grouping tests — costs. — In any action, suit, or proceeding wherein the paternity of any child or children is denied, the court on the motion of the reputed father shall order the mother, her child or children, and the reputed father to submit to one or more blood grouping tests by a duly qualified physician or other duly qualified person to determine whether or not the reputed father can be excluded as being the father of said child or children, and the results of such tests may be received in evidence, but only in cases where definite exclusion is established. . . ."
36 384 P.2d at 732.
37 Beck v. Beck, 384 P.2d 731 (Colo. 1963).
38 See 46 A.L.R.2d 1000 (1956).
39 392 P.2d 991 (Colo. 1963).

home presided over by their stepfather. At the hearing, Nelson, the father, attempted to introduce records and testimony of the new husband's mental unfitness. Nelson established that Grissom, the new husband, had threatened his own children by a prior marriage with a loaded rifle and had on that occasion shot himself. Grissom was already settled in California and was not present. The court excluded the hospital records and doctor's testimony on the ground that they were privileged.

After considering the facts, the supreme court decided that evidence of Grissom's emotional stability, or lack of it, was material to the issue of whether or not it was in the best interest of the children to permit their removal to California where they would live in Grissom's home. Nelson, it said, should have been given an opportunity in the trial court to show that the records and testimony were not privileged and that each was otherwise competent. "Statements made by one to a doctor are not *ipso facto* privileged, but are privileged only if they meet all the several requirements contained in C.R.S. '53, 153-1-7(4)."[40] The case is unique in that it is not the unfitness of the natural parent which is being questioned,

40 *Id.* at 993.

but that of a stepparent with whom the children will have to live. However, the court said in the leading case of *Wilson v. Mitchell*:

> Thus by natural law, by common law, and likewise the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control and education, or when some *exceptional circumstances appear which render such custody inimicable to the best interests of the child.*[41]

The above quote, combined with the general rule that the welfare of the child controls,[42] is sufficient to account for the decision.

Another case, *Lee v. Missouri Pac. R. Co.*,[43] reaffirmed the Colorado rule relating to the probative value of negative evidence. That rule is:

> The probative force of negative testimony depends largely upon circumstances. In some circumstances, its probative force may be so slight as to reach the vanishing point; in other circumstances, such testimony may be more persuasive than the positive testimony of some witnesses. It is only when it is so clear that such testimony has no probative value whatever that reasonable men would not differ in their conclusions with reference thereto, that courts are justified in disregarding it on the ground that it does not rise to the dignity of evidence.[44]

In *Lee*, the court also held that by showing a railroad investigator could not testify coherently on deposition without refreshing his memory from a file covering the accident, the plaintiff had demonstrated a right to have the file produced by subpoena duces tecum under Colorado Rule 45(b), subject to any protective orders by the court.

The decision in *Colorado Fuel & Iron Corp. v. Industrial Com'n*[45] clarified and expanded a prior holding that no medical proof of causation was necessary in workmen's compensation cases. The court said:

> [W]e now add [to the prior decision] that if the rule were otherwise an unattended injury or death in many cases could never be compensated. All that is necessary to warrant the finding of a causal connection between the accident and the disability, is to show facts and circumstances which would indicate with reasonable probability that the injury or death resulted from or was precipitated by the accident.[46]

The foregoing 1963 cases are the ones chosen as having significant impact in the law of evidence. The remaining cases, concerning such matters as judicial notice, corroboration of confessions made extra-judicially, weight of testimony, parol evidence, admission of documents to refresh recollection, impeachment and waiver of privilege or objection, follow well-established rules and add little to the further development of the law.

41 48 Colo. 454, 466, 111 Pac. 21, 26 (1910). (Emphasis added.)
42 Coulter v. Coulter, 141 Colo. 236, 347 P.2d 492 (1959).
43 381 P.2d 35 (Colo. 1963).
44 Colorado & S. Ry. v. Honaker, 92 Colo. 239, 248, 19 P.2d 750, 763 (1933).
45 380 P.2d 28 (Colo. 1963).
46 *Id.* at 30.