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Title 77: Criminal Procedure Chapter 14-16 Defenses to Mental Exam - 1995 Replacement Volume

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Key Numbers. — Criminal Law ⚩ 274.

CHAPTER 14
DEFENSES

Section
77-14-1. Time and place of alleged offense — Specification.
77-14-2. Alibi — Notice requirements — Witness lists.
77-14-3. Testimony regarding mental state of defendant or another — Notice requirements — Right to examination.
77-14-4. Insanity or diminished mental capacity — Notice requirement — Mental examination of defendant.
77-14-5, 77-14-5.5. Repealed.
77-14-6. Entrapment — Notice of claim required.

77-14-1. Time and place of alleged offense — Specification.

The prosecuting attorney, on timely written demand of the defendant, shall within ten days, or such other time as the court may allow, specify in writing as particularly as is known to him the place, date and time of the commission of the offense charged.

History: C. 1953, 77-14-1, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Right of accused to demand nature and cause of accusation against him, Utah Const., Art. I, § 12.

NOTES TO DECISIONS

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Allegation and proof of date.
Allegation and proof of place.
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—Effect.
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—Sufficiency.
—Time for furnishing.
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Allegation and proof of date.

Indictment for grand larceny was not required to allege day certain as time of commission of crime, and allegation that crime was committed "on or about" specified date was sufficient. State v. Woolsey, 19 Utah 486, 57 P. 426 (1899).

In prosecution for adultery, information which charged that defendant, a married man, on February 13, and on diverse other days, and thence continually between February 13 and April 1 committed adultery with an unmarried woman was sufficient; information charged only one offense and was not objectionable for duplicity. State v. Thompson, 31 Utah 228, 87 P. 709 (1906).

Where time was not an essential ingredient of offense, state was not required to prove alleged offense and transaction out of which it arose at or about particular time stated in information, but could prove them at any other and prior time within statutory period of limitations. State v. Greene, 38 Utah 389, 115 P. 181 (1910).

In prosecution for statutory rape, where complaint upon which preliminary examination was held charged act of unlawful intercourse as having occurred on July 13, defendant could not be convicted for offense committed on same girl on July 15; while the date as alleged was immaterial, the actual transaction charged was always material and, if controverted, had to be established by the evidence. State v. Nelson, 52 Utah 617, 176 P. 860 (1918).

Where time was not the essence of the crime, exact time was immaterial, and if evidence otherwise supported charge relied upon by prosecution, conviction could not be set aside because crime was committed after date charged in information or indictment, so long

as it was committed prior to bringing of prosecution. State v. Distefano, 70 Utah 586, 262 P. 113 (1927).

Issue of time of offense could be material where defense of alibi was advanced or where there was danger of double jeopardy. State v. Cooper, 114 Utah 531, 201 P.2d 764 (1949).

Trial judge's comments, made at conclusion of evidence in indecent assault case, that "The event may not have occurred on the 2nd day of August [as alleged], but on some date very close to that time.... It may have been a different day that this occurred. I don't know" were not grounds for reversal of conviction where judge otherwise clearly and unequivocally indicated he thought defendant was guilty as charged. State v. Mecham, 23 Utah 2d 18, 456 P.2d 156 (1969).

The state's failure to specify the time, date, and place of offenses of child abuse against an infant over a 32-month period did not violate the defendant's right to notice under the Utah Constitution because the time frame specified was reasonable under all the circumstances, considering the age of the child and the continual nature of the contact between the child and defendant. State v. Wilcox, 808 P.2d 1028 (Utah 1991).

Allegation and proof of place.

If an indictment charged that the offense was committed in "said district" followed by an averment of the county in which committed, latter allegation was surplusage, and it was immaterial whether it was sustained by the testimony. Naming the district was sufficient. United States v. Kershaw, 5 Utah 618, 19 P. 194 (1888).

Amendment of date of occurrence.

A defendant is entitled to a bill of particulars explaining the state's amendment of the information, changing the date of the occurrence of the crime charged, in order to determine whether the change was made in good faith or to avoid the defendant's alibi defense. State v. Robbins, 709 P.2d 771 (Utah 1985).

Bill of particulars.

Granting of bill of particulars was not discretionary with court, but under statute was a right which defendant could demand and which court must grant if statutory conditions were present. State v. Solomon, 93 Utah 70, 71 P.2d 104 (1937).

If information in short form for homicide failed to state the name of the person murdered, merely stating that his true name was unknown, facts to identify the victim could be supplied by the bill of particulars, if defendant desired to have them. State v. Crank, 105 Utah 332, 142 P.2d 178, 170 A.L.R. 542 (1943).

Where defendant in manslaughter prosecution was charged with only one unlawful act, a battery, allegation in bill of particulars that battery occurred when defendant engaged in mutual combat with deceased was mere surplusage and did not state separate unlawful act. State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947).

—Effect.

The bill of particulars was a pleading on the part of the state which limited or circumscribed the area, field, or transaction, as to which the state could offer evidence. Only those matters in the bill of particulars which came within the charge stated in the information were open to investigation and evidence. The bill of particulars thus limited the field of inquiry under the charge laid in the information, but could not extend or expand the field beyond the elements constituting the crime charged. State v. Spencer, 101 Utah 274, 117 P.2d 455 (1941), rehearing denied, 101 Utah 287, 121 P.2d 912 (1942), overruled on another issue, State v. Hutchinson, 4 Utah 2d 404, 295 P.2d 345 (1956).

—Purpose.

If accused was in doubt as to the nature and cause of the accusation against him, the alleged fact or facts which the state proposed to prove could be secured by demanding a bill of particulars. State v. Robbins, 102 Utah 119, 127 P.2d 1042 (1942).

The purpose of a bill of particulars is to inform defendant of the particulars of the offense sufficiently to enable him to prepare his defense. State v. Jameson, 103 Utah 129, 134 P.2d 173 (1943).

—Sufficiency.

Where defendant charged with murder moved to quash information on ground that no bill of particulars had been furnished, and after district attorney furnished bill upon order of court, motion to quash was renewed on ground of insufficiency of bill ordered, motion was properly denied since defendant did not point out any further particular which he desired, nor claim that he was adversely affected in the preparation of his case by the failure to furnish the bill of particulars. State v. Russell, 106 Utah 116, 145 P.2d 1003 (1944).

Where homicide information (involuntary manslaughter), which was in archaic common-law form and not in statutory form, sufficiently informed defendant that he was charged with operating motor vehicle on left half of certain highway while driving in northerly direction thereon, and defendant's demand for bill of particulars was general in form and did not specify wherein information was so general that defendant could not properly prepare his defense, trial court did not abuse its discretion in denying bill of particulars, especially where defendant failed to show that he was prejudiced

thereby. State v. Riddle, 112 Utah 356, 188 P.2d 449 (1948).

—Time for furnishing.

Failure to furnish bill of particulars until Friday before trial set for Monday was not prejudicial error; defendant failed to seek information and, anyway, he had access to it. State v. Lowder, 25 Utah 2d 418, 483 P.2d 886 (1971).

—Waiver.

If defendant made no demand for a bill of particulars, he could not successfully urge on appeal that the trial court erred in failing to furnish such bill of particulars. State v. Bleazard, 103 Utah 113, 133 P.2d 1000 (1943).

Evidence not furnished to defendant.

Section was designed to enable defendant to have stated the particulars of the charge which he must meet, where short form of indictment or information is used. It is not intended as a device to compel prosecution to give accused person a preview of evidence on which state relies to sustain the charge. State v. Lack, 118 Utah 128, 221 P.2d 852 (1950).

There was no requirement that defendant be told what evidence would be presented to prove the charge against him. State v. Moraine, 25 Utah 2d 51, 475 P.2d 831 (1970).

A bill of particulars need not plead matters of evidence that the prosecution plans to use at trial. State v. Mitchell, 571 P.2d 1351 (1977).

Instructions.

—Time of offense.

In prosecution for having carnal knowledge of female between the ages of thirteen and eighteen, instruction which charged jury that it was immaterial whether act charged occurred on the 8th or 15th of September, although information charged that act was committed on the 8th, was not erroneous as authorizing jury to find defendant guilty of either one of two crimes. State v. Distefano, 70 Utah 586, 262 P. 113 (1927).

In carnal knowledge prosecution in which trial court restricted jury to finding that illegal act of intercourse took place at a specified site, it was not error to instruct that state was required to prove act took place "on or about the 26th day of June," rather than "on the 26th day of June," since there was no evidence that act alleged took place on any date other than the 26th. State v. Rosenberg, 84 Utah 402, 35 P.2d 1004 (1934).

Preliminary hearing.

Where no demand was made for bill of particulars until day set for preliminary hearing to commence, it was not error for magistrate to proceed with hearing over objection of defendant, and to refuse to postpone hearing, where demand was not made until a full week after he was advised of allegations of complaint. State v. Gunn, 102 Utah 422, 132 P.2d 109 (1942).

Cited in State v. Bates, 784 P.2d 1126 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

Am. Jur. 2d. — 41 Am. Jur. 2d Indictments and Informations §§ 159 to 170.

C.J.S. — 42 C.J.S. Indictments and Informations §§ 90 to 98.

Key Numbers. — Indictment and Information ⇐ 86, 87, 121.1.

77-14-2. Alibi — Notice requirements — Witness lists.

(1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, of the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence.

(2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.

(3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.

(4) The court may, for good cause shown, waive the requirements of this section.

History: C. 1953, 77-14-2, enacted by L. 1980, ch. 15, § 2.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Attorney and client privilege.
Burden of proof.
Instructions.
Insufficient notice.
—Exclusion of witness.
Notification of second alibi witness.
Waiver of notice.
Cited.

Constitutionality.

Validity of section was upheld against defendant's assertion that he was denied due process because the trial court's exclusion of alibi evidence under section prevented him from presenting a defense. Defendant had the opportunity to present alibi testimony; all he needed to do was comply with the timing requirements of this section. State v. Maestas, 815 P.2d 1319 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991).

Attorney and client privilege.

Information as to his alibi given by defendant to his attorney, so that the attorney could give notice to the prosecutor, was not intended to be confidential, and it was not privileged. State v. Gay, 6 Utah 2d 122, 307 P.2d 885, cert. denied, 355 U.S. 899, 78 S. Ct. 275, 2 L. Ed. 2d 196 (1957).

Burden of proof.

Section does not operate to shift the burden of proof to the defendant; the state, in all cases where the presence of the accused was necessary to render him responsible, must prove that he was there, and if from all the evidence there exists a reasonable doubt of his presence, he should be acquitted. State v. Whitley, 100 Utah 14, 110 P.2d 337 (1941).

Instructions.

Instruction in prosecution for indecent assault upon minor child, which permitted jury to find defendant guilty if they found that the offense was committed under substantially the conditions detailed by the state's witnesses, was prejudicial where defendant had interposed the defense of alibi. State v. Waid, 92 Utah 297, 67 P.2d 647 (1937).

Insufficient notice.

—Exclusion of witness.

Trial court did not abuse its discretion in excluding defendant's alibi witness on ground of insufficient notice where defense counsel stated there was no good cause for the failure. State v. Anderson, 25 Utah 2d 26, 474 P.2d 735 (1970).

Notification of second alibi witness.

Trial court should not have refused to permit the defendant to substitute, five days before trial, a second alibi witness for the one he had originally designated, eight days before trial and with the approval of the court, where there was a showing that the first witness's unavailability was beyond defendant's control, that the defendant would be substantially prejudiced by the failure to permit substitution, that the testimony of the second witness would be substantially identical to that of the first, and that the defendant acted with due speed in notifying the prosecution of the necessary substitution. State v. Ortiz, 712 P.2d 218 (Utah 1985).

Waiver of notice.

Where defendant had actual knowledge of the identity of a witness the prosecution intended to call to rebut his alibi, and where there was no evidence that the prosecution willfully concealed the identity of its witness, trial court was justified in waiving notice requirements and denying defendant's motion for a mistrial. State v. Case, 547 P.2d 221 (Utah 1976).

Court did not abuse its discretion in waiving the notice requirements for the state's rebuttal witnesses to defendant's alibi when the wit-

nesses had already testified and defendant actually knew the content of their testimony, and their rebuttal testimony did not result in the introduction of new evidence, but only clarified testimony already given. State v. Haddenham, 585 P.2d 447 (Utah 1978).

There was no error in allowing prosecution's alibi rebuttal witness to testify without prior notice to defendant where trial court's findings of fact and conclusions of law expressly stated "the trial court applied the good cause standard and waived the notice requirement as provided by said statute." Gentry v. Smith, 600 P.2d 1007 (Utah 1979).

Cited in State v. Albretsen, 782 P.2d 515 (Utah 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 192 to 200.

C.J.S. — 22 C.J.S. Criminal Law § 87.

A.L.R. — Validity and construction of statute requiring defendant in criminal case to disclose matter as to alibi defense, 45 A.L.R.3d 958.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 A.L.R.3d 617.

Propriety and prejudicial effect of "on or about" instruction where alibi evidence in federal criminal case purports to cover specific date shown by prosecution evidence, 92 A.L.R. Fed. 313.

Key Numbers. — Criminal Law ⇐ 286.

77-14-3. Testimony regarding mental state of defendant or another — Notice requirements — Right to examination.

(1) (a) If the prosecution or the defense intends to call any expert to testify at trial or at any hearing regarding the mental state of the defendant or another, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before any hearing at which the testimony is offered. Notice shall include the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report.

(b) The expert shall prepare a written report relating to the proposed testimony. If the expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony including any opinion and the bases and reasons of that opinion, the party intending to call the expert shall provide a written explanation of the expert's anticipated testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by the expert when available.

(2) As soon as practicable after receipt of the expert's report, the party receiving notice shall provide notice to the other party of witnesses whom the party anticipates calling to rebut the expert's testimony, including the name and address of any expert witness and the expert's curriculum vitae. If available, a report of any rebuttal expert shall be provided. If the rebuttal expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed rebuttal testimony, or in the event the witness is not an expert, the party intending to call the rebuttal witness shall provide a written explanation of the witness's anticipated rebuttal testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by any rebuttal expert when available.

(3) If the prosecution or the defense proposes to introduce testimony of an expert which is based upon personal contact, interview, observation, or

psychological testing of the defendant, testimony of an expert involving a mental diagnosis of the defendant, or testimony of an expert that the defendant does or does not fit a psychological or sociological profile, the opposing party shall have a corresponding right to have its own expert examine and evaluate the defendant.

(4) This section applies to any trial, sentencing hearing, and other hearing, excluding a preliminary hearing, whether or not the defendant proposes to offer evidence of the defense of insanity or diminished mental capacity.

(5) If the defendant or the prosecution fails to meet the requirements of this section, the opposing party shall be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony. If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions.

(6) This section may not require the admission of evidence not otherwise admissible.

History: C. 1953, 77-14-3, enacted by L. 1980, ch. 45, § 2; 1983, ch. 49, § 3; 1986, ch. 120, § 2; 1994, ch. 139, § 1.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, deleted former Subsection (1), relating to requirements for written notice of a defendant's intention to claim insanity or diminished mental capacity; rewrote Subsection (1)(a), which read "When either the prosecution or the defense intends to call any mental health expert to testify at trial regarding a defendant's mental state, excluding rebuttal testimony, the expert shall be required to prepare a written report of findings, and counsel intending to call the expert shall provide a copy of any report to opposing counsel as soon as practicable, but not less than ten days before trial"; added Subsection (1)(b) and Subsections (2) to (4); rewrote Subsection (5), which read "If the defendant fails to meet the requirements of Subsection (1), he may not introduce evidence tending to establish the defense unless the court for good cause shown otherwise orders"; rewrote Subsection (6), which read "Nothing in this section is intended to require the admission of evidence not otherwise admissible"; and made related stylistic changes. For present provisions comparable to former Subsection (1), see § 77-14-4(1).

Cross-References. — Inquiry into sanity of defendant, § 77-15-1 et seq.

NOTES TO DECISIONS

Analysis

Continuance of trial for investigation.
Cited.

Continuance of trial for investigation.

Trial court did not abuse its discretion in refusing continuance on day of trial to investigate sanity of defendant where prior attorney for defendant had been granted a continuance to investigate sanity, no statutory notice of defense of insanity had been given, and no further request for continuance was made until morning of trial. State v. Martinez, 15 Utah 2d 303, 392 P.2d 39 (1964).

Cited in State v. Bishop, 753 P.2d 439 (Utah 1988); State v. Cummins, 839 P.2d 848 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Brigham Young Law Review. — Comment, Utah's Manslaughter Statute: Walking the Tightrope Between Social Utility and Fair Culpability Assessment, 1986 B.Y.U. L. Rev. 165.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 65 to 68.

C.J.S. — 22 C.J.S. Criminal Law § 100.

A.L.R. — Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Key Numbers. — Criminal Law ⇐ 286.

77-14-4. Insanity or diminished mental capacity — Notice requirement — Mental examination of defendant.

(1) If a defendant proposes to offer evidence that he is not guilty as a result of insanity or that he had diminished mental capacity, he shall file and serve the prosecuting attorney with written notice of his intention to claim the defense at the time of arraignment or as soon afterward as practicable, but not fewer than 30 days before the trial.

(2) If the court receives notice that a defendant intends to claim that he is not guilty by reason of insanity or that he had diminished mental capacity, the court shall order the Department of Human Services to examine the defendant and investigate his mental condition. The person or organization directed by the department to conduct the examination shall testify at the request of the court or either party in any proceeding in which the testimony is otherwise admissible. Pending trial, unless the court or the executive director directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(3) The defendant shall make himself available and fully cooperate in the examination by the department and any other independent examiners for the defense and the prosecuting attorney. If the defendant fails to make himself available and fully cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant is barred from presenting expert testimony relating to his defense of mental illness at the trial of the case. The department shall complete the examination within 30 days after the court's order and shall prepare and provide to the court prosecutor and defense counsel a written report concerning the condition of the defendant.

(4) Within ten days after receipt of the report from the department, but not later than five days before the trial of the case, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of mental illness, which shall contain the names of witnesses the prosecuting attorney proposes to call in rebuttal.

(5) The reports of any other independent examiner are admissible as evidence upon stipulation of the prosecution and defense.

(6) This section does not prevent any party from producing any other testimony as to the mental condition of the defendant. Expert witnesses who are not appointed by the court are not entitled to compensation under Subsection (8).

(7) This section may not require the admission of evidence not otherwise admissible.

(8) Expenses of examination ordered by the court under this section shall be paid by the Department of Human Services. Travel expenses associated with the examination incurred by the defendant shall be charged by the department to the county where prosecution is commenced. Examination of defendants charged with violation of municipal or county ordinances shall be charged by the department to the entity commencing the prosecution.

History: C. 1953, 77-14-4, enacted by L. 1980, ch. 15, § 2; 1983, ch. 49, § 4; 1986, ch. 120, § 3; 1989, ch. 197, § 1; 1991, ch. 166, § 3; 1994, ch. 139, § 2.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, rewrote Subsection (1); substituted "department" for "court appointed examiners" and for "examiners" in the first and last sentences of Subsection (2) and in Subsection (3); deleted "the Utah State

Hospital or" before "any other" and made stylistic changes in Subsection (4); deleted former Subsection (5), relating to examiners' fees and expenses; renumbered former Subsections (6) and (7) as (5) and (6); substituted "Subsection (7)" for "Subsection (5), except on order of the court, for good cause shown" from the end of Subsection (5); and added Subsection (7).

The 1994 amendment, effective May 2, 1994, added Subsection (1); redesignated former Subsections (1) to (7) as Subsections (2) to (8); and made stylistic changes.

Cross-References. — Department of Human Services, § 62A-1-102.

Expert testimony, Rules 701 to 706, U.R.E.

Utah State Hospital and other mental health facilities, § 62A-12-201 et seq.

NOTES TO DECISIONS

ANALYSIS

Appointment of examiners.
Communications between examiners.
Continuance of trial for investigation.
Examination after conviction.
Timeliness of notice.
Voluntary intoxication.
Cited.

Appointment of examiners.

Trial court did not abuse its discretion in appointing alienists, in response to the timely motion for appointment of alienists by counsel for defendants, rather than ordering a 30-day psychological evaluation at a state hospital for the purpose of investigating the defendants' defenses of diminished mental capacity due to intoxication and alcoholism under § 77-15-5. State v. O'Brien, 721 P.2d 896 (Utah 1986).

Communications between examiners.

Communications between examiners appointed to examine defendant which did not contribute to the opinions of the examiners as to the mental condition of defendant was not grounds for a coram vobis petition. State v. Poulson, 16 Utah 2d 151, 397 P.2d 70 (1964), cert. denied, 381 U.S. 947, 85 S. Ct. 1795, 14 L. Ed. 2d 723 (1965).

There was no reversible error in murder trial conviction where the first of three court-appointed psychiatrists to examine the accused sent his notes on the examination to the other two psychiatrists, since it appeared from post-trial hearings that the opinions of the second and third examiners as to the defendant's mental condition were based on full, separate, and independent examinations, and therefore, no writ of habeas corpus would issue on grounds that such communications had been prejudicial to defendant's constitutional rights. Poulson v. Turner, 359 F.2d 588 (10th Cir.), cert. denied, 385 U.S. 905, 87 S. Ct. 219, 17 L. Ed. 2d 136 (1966).

Continuance of trial for investigation.

Trial court did not abuse its discretion in refusing continuance on day of trial to investigate sanity of defendant where prior attorney for defendant had been granted a continuance to investigate sanity, no statutory notice of defense of insanity had been given, and no further request for continuance was made until morning of trial. State v. Martinez, 15 Utah 2d 303, 392 P.2d 39 (1964).

Examination after conviction.

Where defendant had already been given a mental examination as required by this section, pursuant to the defendant's assertion of the defense of diminished capacity, no additional mental examination under § 77-16-1, relating to mental examination after conviction, was necessary. State v. DePlonty, 749 P.2d 621 (Utah 1987).

Timeliness of notice.

Notice under Subsection (1) was untimely when filed fourteen days after the arraignment, which was six days before trial. State v. Cabututan, 861 P.2d 408 (Utah 1993) (decided under former § 77-14-3(1)).

Voluntary intoxication.

Appointment of a psychiatrist to testify as to the effect of defendant's voluntary intoxication on his ability to form the requisite intent for the crimes charged would have been unavailing because of the lack of a sufficient foundation as to the amount of alcohol defendant consumed before the crime. State v. Cabututan, 861 P.2d 408 (Utah 1993).

Cited in State v. Bishop, 753 P.2d 439 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 76 to 79.

A.L.R. — Burden and sufficiency of proof of mental irresponsibility in criminal case, modern status of rules as to, 17 A.L.R.3d 146.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Key Numbers. — Criminal Law ⚷ 474.

77-14-5, 77-14-5.5. Repealed.

Repeals. — Laws 1992, ch. 171, § 17 repeals § 77-14-5, as last amended by L. 1991, ch. 5, § 91, ch. 66, § 1, ch. 207, § 43, and ch. 292, § 3, providing for a hearing on the mental condition of a defendant found not guilty by reason of insanity, effective July 1, 1992. For present comparable provisions, see § 77-16a-302.

Laws 1992, ch. 30, § 170, attempted to amend this section, but the repeal of this section was given precedence by the Office of Legislative Research and General Counsel.

Laws 1992, ch. 171, § 17 repeals § 77-14-5.5, as enacted by L. 1989, ch. 246, § 2, concerning court procedures upon judgment of not guilty by reason of insanity, effective July 1, 1992. For present comparable provisions, see § 77-16a-303.

77-14-6. Entrapment — Notice of claim required.

Notice of a claim of entrapment shall be given by the defendant in accord with Section 76-2-303.

History: C. 1953, 77-14-6, enacted by L. 1980, ch. 15, § 2; 1986, ch. 194, § 19.

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 202 to 209.

A.L.R. — False arrest or imprisonment: entrapment as precluding justification of arrest or imprisonment, 15 A.L.R.3d 963.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 A.L.R.3d 293.

Entrapment as a defense in proceedings to revoke or suspend license to practice law or medicine, 61 A.L.R.3d 357.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged, 5 A.L.R.4th 1128.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense, 8 A.L.R.4th 1160.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Key Numbers. — Criminal Law ⚷ 37.

CHAPTER 15

INQUIRY INTO SANITY OF DEFENDANT

Section	
77-15-1.	Incompetent person not to be punished for crime.
77-15-2.	"Incompetent to proceed" defined.
77-15-3.	Petition for inquiry as to defendant or prisoner — Filing — Contents.
77-15-4.	Court may raise issue of competency at any time.
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77-15-1. Incompetent person not to be punished for crime.

No person who is incompetent to proceed shall be tried or punished for a public offense.

History: C. 1953, 77-15-1, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Death penalty decreed, insanity after, § 77-19-13.

Mental disease or defect as defense, § 76-2-305.

Notice of proposed insanity defense, § 77-14-3.

Statutory construction, "insane person," § 68-3-12(2)(j).

NOTES TO DECISIONS

ANALYSIS

Criminal responsibility.
Instructions.
Presumptions and burden of proof.
Cited.

Criminal responsibility.

In criminal prosecution, the true test of insanity as defense was whether defendant, at time of commission of offense, had mental capacity to know that in doing act, he was doing wrong. State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (n.s.) 545 (1909).

Insane person could not legally be guilty of criminal intent. State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (n.s.) 545 (1909).

Instructions.

In prosecution for having intercourse with female under age of eighteen in which defense of insanity was interposed, instruction, that if from consideration of all evidence, jury entertained reasonable doubt as to sanity of defendant at time of commission of offense, or that he was mentally irresponsible at time of alleged act, jury should find defendant not guilty, and that insanity or mental unsoundness must be of such degree as to leave accused in such mental state as to deprive him of capacity to understand that act committed constituted offense and was wrong, fairly defined law governing rights of accused upon defense of insanity. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Presumptions and burden of proof.

Burden of overcoming presumption of sanity rested primarily upon defendant, and he was required to overthrow it by preponderance of evidence; when defendant offered sufficient evidence to overcome this presumption, state must have established his sanity beyond reasonable doubt. State v. Brown, 36 Utah 46, 102 P. 641, 24 L.R.A. (n.s.) 545 (1909).

When testimony has been introduced to overcome presumption of sanity, burden shifts and it is incumbent upon state to prove beyond reasonable doubt that defendant was sane at time of commission of offense; however there might be instances where evidence on insanity offered by defendant is so weak and inconclusive that state might well insist on presumption of sanity and thus need not offer any rebuttal evidence. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Cited in Cook v. Steed, 758 P.2d 906 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 95, 122.

C.J.S. — 24 C.J.S. Criminal Law § 1486.

A.L.R. — Amnesia as affecting capacity to commit crime or stand trial, 46 A.L.R.3d 544.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Key Numbers. — Criminal Law ⚩ 981; Mental Health ⚩ 432.

77-15-2. "Incompetent to proceed" defined.

For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:

(1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or

(2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.

History: C. 1953, 77-15-2, enacted by L. 1980, ch. 15, § 2; 1993, ch. 142, § 1; 1994, ch. 162, § 1.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, substituted "have a rational and factual understanding" for "comprehend the nature" in Subsection (1), substituted "consult with his counsel with a reasonable degree of rational understanding" for "assist his counsel in his defense" in Subsection (2), and made stylistic changes throughout the section.

The 1994 amendment, effective May 2, 1994, substituted "disorder or mental retardation" for "disease or defect" in the introductory language and inserted "and to participate in the proceedings against him" in Subsection (2).

Severability Clauses. — Laws 1994, ch. 162, which amended or repealed and reenacted several sections throughout this chapter, provides in § 8: "If any provision of this act, or the implication of any provision to any person or circumstance, is held invalid, the remainder of this act is given effect without the invalid provision or application."

NOTES TO DECISIONS

ANALYSIS

Arrest of judgment.
Temporary incompetence.
Cited.

Arrest of judgment.

When an alienist specifically found defendant competent to proceed to sentencing, trial court did not err in refusing to arrest judgment despite the fact that defendant may have suffered from an undetermined "mental illness." State v. Cantu, 750 P.2d 591 (Utah 1988).

Temporary incompetence.

Trial court's statement that defendant was incompetent to change his plea, which statement was based solely on defendant's temporary emotional state at one point in the trial, did not indicate an inability to assist trial counsel, and the court, therefore, did not err in not holding a competency hearing. State v. Young, 780 P.2d 1233 (1989).

Cited in Cook v. Steed, 758 P.2d 906 (Utah 1988); State v. Drobel, 815 P.2d 724 (Utah Ct. App.)

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 56 to 64.

C.J.S. — 22 C.J.S. Criminal Law § 99 et seq.

Key Numbers. — Criminal Law ⇐ 47 to 51.

77-15-3. Petition for inquiry as to defendant or prisoner — Filing — Contents.

(1) Whenever a person charged with a public offense or serving a sentence of imprisonment is or becomes incompetent to proceed, as defined in this chapter, a petition may be filed in the district court of the county where the charge is pending or where the person is confined.

(2) (a) The petition shall contain a certificate that it is filed in good faith and on reasonable grounds to believe the defendant is incompetent to proceed. The petition shall contain a recital of the facts, observations, and conversations with the defendant that have formed the basis for the petition. If filed by defense counsel, the petition shall contain such information without invading the lawyer-client privilege.

(b) The petition may be based upon knowledge or information and belief and may be filed by the party alleged incompetent to proceed, any person

acting on his behalf, the prosecuting attorney, or any person having custody or supervision over the person.

History: C. 1953, 77-15-3, enacted by L. 1980, ch. 15, § 2; 1994, ch. 162, § 2.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, inserted "to proceed" in Subsection (1); designated the former first sentence of Subsection (2) as Subsection (2)(a) and rewrote the provision which read "The petition shall set forth the facts upon which the allegations of incompetency to proceed are based"; designated the last sentence of former Subsection (2) as Subsection (2)(b); and made stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Court-ordered hearing.
Cited.

Court-ordered hearing.

The trial court has no statutory duty to order a competency hearing in the absence of a petition. State v. Bailey, 712 P.2d 281 (Utah 1985).

Cited in Cook v. Steed, 758 P.2d 906 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 107 to 113, 127, 128.

C.J.S. — 24 C.J.S. Criminal Law § 1486.

Key Numbers. — Criminal Law ⚷ 623, 625, 981; Mental Health ⚷ 434.

77-15-4. Court may raise issue of competency at any time.

The court in which a charge is pending may raise the issue of the defendant's competency at any time. If raised by the court, counsel for each party shall be permitted to address the issue of competency.

History: C. 1953, 77-15-4, enacted by L. 1980, ch. 15, § 2; 1994, ch. 162, § 3.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, substituted the language beginning "raise the issue" for "direct the prosecuting attorney to file a petition pursuant to Section 77-15-3(1)" at the end of the first sentence and added the second sentence.

77-15-5. Order for hearing — Stay of other proceedings — Examinations of defendant — Scope of examination and report.

(1) When a petition is filed pursuant to Section 77-15-3 raising the issue of the defendant's competency to stand trial or when the court raises the issue of the defendant's competency pursuant to Section 77-15-4, the court in which proceedings are pending shall stay all proceedings. If the proceedings are in a court other than the district court in which the petition is filed, the district court shall notify that court of the filing of the petition. The district court in which the petition is filed shall pass upon the sufficiency of the allegations of incompetency. If a petition is opposed by either party, the court shall, prior to granting or denying the petition, hold a limited hearing solely for the purpose of determining the sufficiency of the petition. If the court finds that the allegations of incompetency raise a bona fide doubt as to the defendant's competency to stand trial, it shall enter an order for a hearing on the mental condition of the person who is the subject of the petition.

(2) (a) After the granting of a petition and prior to a full competency hearing, the court may order the Department of Human Services to examine the person and to report to the court concerning the defendant's mental condition.

(b) The defendant shall be examined by at least two mental health experts not involved in the current treatment of the defendant.

(c) If the issue is sufficiently raised in the petition or if it becomes apparent that the defendant may be incompetent due to mental retardation, at least one expert experienced in mental retardation assessment shall evaluate the defendant. Upon appointment of the experts, the petitioner or other party as directed by the court shall provide information and materials to the examiners relevant to a determination of the defendant's competency and shall provide copies of the charging document, arrest or incident reports pertaining to the charged offense, known criminal history information, and known prior mental health evaluations and treatments.

(d) The court may make the necessary orders to provide the information listed in Subsection (c) to the examiners.

(3) During the examination under Subsection (2), unless the court or the executive director of the department directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(4) The experts shall in the conduct of their examination and in their report to the court consider and address, in addition to any other factors determined to be relevant by the experts:

(a) the defendant's present capacity to:

(i) comprehend and appreciate the charges or allegations against him;

(ii) disclose to counsel pertinent facts, events, and states of mind;

(iii) comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him;

(iv) engage in reasoned choice of legal strategies and options;

(v) understand the adversary nature of the proceedings against him;

(vi) manifest appropriate courtroom behavior; and

(vii) testify relevantly, if applicable;

(b) the impact of the mental disorder, or mental retardation, if any, on the nature and quality of the defendant's relationship with counsel;

(c) if psychoactive medication is currently being administered:

(i) whether the medication is necessary to maintain the defendant's competency; and

(ii) the effect of the medication, if any, on the defendant's demeanor and affect and ability to participate in the proceedings.

(5) If the expert's opinion is that the defendant is incompetent to proceed, the expert shall indicate in the report:

(a) which of the above factors contributes to the defendant's incompetency;

(b) the nature of the defendant's mental disorder or mental retardation and its relationship to the factors contributing to the defendant's incompetency;

(c) the treatment or treatments appropriate and available; and

(d) the defendant's capacity to give informed consent to treatment to restore competency.

(6) The experts examining the defendant shall provide an initial report to the court and the prosecuting and defense attorneys within 30 days of the receipt of the court's order. The report shall inform the court of the examiner's opinion concerning the competency of the defendant to stand trial, or, in the alternative, the examiner may inform the court in writing that additional time is needed to complete the report. If the examiner informs the court that additional time is needed, the examiner shall have up to an additional 30 days to provide the report to the court and counsel. The examiner must provide the report within 60 days from the receipt of the court's order unless, for good cause shown, the court authorizes an additional period of time to complete the examination and provide the report.

(7) Any written report submitted by the experts shall:

(a) identify the specific matters referred for evaluation;

(b) describe the procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(c) state the expert's clinical observations, findings, and opinions on each issue referred for examination by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(d) identify the sources of information used by the expert and present the basis for the expert's clinical findings and opinions.

(8) (a) Any statement made by the defendant in the course of any competency examination, whether the examination is with or without the consent of the defendant, any testimony by the expert based upon such statement, and any other fruits of the statement may not be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced evidence. The evidence may be admitted, however, where relevant to a determination of the defendant's competency.

(b) Prior to examining the defendant, examiners should specifically advise the defendant of the limits of confidentiality as provided under this subsection.

(9) When the report is received the court shall set a date for a mental hearing which shall be held in not less than five and not more than 15 days, unless the court enlarges the time for good cause. The hearing shall be conducted according to the procedures outlined in Subsections 62A-12-234(9)(b) through (9)(f). Any person or organization directed by the department to conduct the examination may be subpoenaed to testify at the hearing. If the experts are in conflict as to the competency of the defendant, all experts should be called to testify at the hearing if reasonably available. The court may call any examiner to testify at the hearing who is not called by the parties. If the court calls an examiner, counsel for the parties may cross-examine the expert.

(10) A person shall be presumed competent unless the court, by a preponderance of the evidence, finds the person incompetent to proceed. The burden of proof is upon the proponent of incompetency at the hearing. An adjudication of incompetency to proceed shall not operate as an adjudication of incompetency to give informed consent for medical treatment or for any other purpose, unless specifically set forth in the court order.

(11) (a) If the court finds the defendant incompetent to stand trial, its order shall contain findings addressing each of the factors in Subsections 77-15-5(4)(a) and (b). The order issued pursuant to Subsection 77-15-6(1) which the court sends to the facility where the defendant is committed or to the person who is responsible for assessing his progress toward competency shall be provided contemporaneously with the transportation and commitment order of the defendant, unless exigent circumstances require earlier commitment in which case the court shall forward the order within five working days of the order of transportation and commitment of the defendant.

(b) The order finding the defendant incompetent to stand trial shall be accompanied by:

(i) copies of the reports of the experts filed with the court pursuant to the order of examination if not provided previously;

(ii) copies of any of the psychiatric, psychological, or social work reports submitted to the court relative to the mental condition of the defendant;

(iii) any other documents made available to the court by either the defense or the prosecution, pertaining to the defendant's current or past mental condition.

(12) If the court finds it necessary to order the defendant transported prior to the completion of findings and compilation of documents required under Subsection (11), the transportation and commitment order delivering the defendant to the Utah State Hospital, or other mental health facility as directed by the executive director of the Department of Human Services or his designee, shall indicate that the defendant's commitment is based upon a finding of incompetency, and the mental health facility's copy of the order shall be accompanied by the reports of any experts filed with the court pursuant to the order of examination. The executive director of the Department of Human Services or his designee may refuse to accept a defendant as a patient unless he is accompanied by a transportation and commitment order which is accompanied by the reports.

(13) Upon a finding of incompetency to stand trial by the court, the prosecuting and defense attorneys shall provide information and materials relevant to the defendant's competency to the facility where the defendant is committed or to the person responsible for assessing his progress towards competency. In addition to any other materials, the prosecuting attorney shall provide:

(a) copies of the charging document and supporting affidavits or other documents used in the determination of probable cause;

(b) arrest or incident reports prepared by a law enforcement agency pertaining to the charged offense;

(c) information concerning the defendant's known criminal history.

(14) The court may make any reasonable order to insure compliance with this section.

(15) Failure to comply with this section shall not result in the dismissal of criminal charges.

History: C. 1953, 77-15-5, enacted by L. 1980, ch. 15, § 2; 1988, ch. 1, § 399; 1990, ch. 127, § 1; 1991, ch. 166, § 4; 1993, ch. 142, § 2; 1994, ch. 162, § 4.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, rewrote the section to such an extent that a detailed analysis is impracticable.

The 1993 amendment, effective May 3, 1993, in Subsection (5), added "unless the court enlarges the time for good cause" at the end of the first sentence, substituted "according to the procedures outlined in Subsections 62A-12-234(9)(b) through (9)(f)" for "as provided in Section 62A-12-234" in the second sentence, made a stylistic change at the beginning of the third sentence, and added the next-to-last and last sentences.

The 1994 amendment, effective May 2, 1994, rewrote Subsection (1) which read "When a petition is filed pursuant to Section 77-15-3, the court shall enter an order for a hearing on the mental condition of the person who is the subject of the petition"; in Subsection (2), added the subsection designation "(a)," substituted "After the granting of a petition and prior to a full competency hearing" for "Prior to the hearing" at the beginning, and substituted "the defendant's" for "his"; added Subsections (2)(b) to (2)(d), Subsections (4) to (6) and Subsections (7), (8), and (10) to (15); designated former Subsections (4) and (5) as Subsections (3) and (9), respectively; deleted former Subsection (6) which read "All other proceedings pending against the defendant shall be stayed until the proceedings to determine his mental condition are terminated"; in Subsection (9), deleted the former fourth and fifth sentences relating to the presumption of competency and burden of proof of the proponent of incompetency and added the last three sentences; and made stylistic changes.

NOTES TO DECISIONS

Analysis

Appointment of examiners.
Court-ordered hearing.

Appointment of examiners.

Trial court did not abuse its discretion in appointing alienists under § 77-14-4, in response to the timely motion for appointment of alienists by counsel for defendants, rather than ordering a 30-day psychological evaluation at a state hospital for the purpose of investigating the defendants' defenses of diminished mental capacity due to intoxication and alcoholism under this section. Even though the trial court appointed alienists under § 77-14-4, its actions were also entirely proper under this section. State v. O'Brien, 721 P.2d 896 (Utah 1986).

Court-ordered hearing.

The trial court has no statutory duty to order a competency hearing in the absence of a petition. State v. Bailey, 712 P.2d 281 (Utah 1986).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 107 to 113, 127, 128.

Key Numbers. — Criminal Law ⚷ 623, 625, 981; Mental Health ⚷ 434.

77-15-6. Commitment on finding of incompetency to stand trial — Subsequent hearings — Notice to prosecuting attorneys.

(1) Except as provided in Subsection (5), if after hearing, the person is found to be incompetent to stand trial, the court shall order the defendant committed to the custody of the executive director of the Department of Human Services or his designee for the purpose of treatment intended to restore the defendant to competency. The court may recommend but not order placement of the defendant. The court may, however, order that the defendant be placed in a secure setting rather than a nonsecure setting. The director or his designee shall designate the specific placement of the defendant during the period of evaluation and treatment to restore competency.

(2) The examiner or examiners designated by the executive director to assess the defendant's progress toward competency may not be involved in the routine treatment of the defendant. The examiner or examiners shall provide a full report to the court and prosecuting and defense attorneys within 90 days of receipt of the court's order. If any examiner is unable to complete the assessment within 90 days, that examiner shall provide to the court and

counsel a summary progress report which informs the court that additional time is necessary to complete the assessment, in which case the examiner shall have up to an additional 90 days to provide the full report. The full report shall assess:

(a) the facility's or program's capacity to provide appropriate treatment for the defendant;

(b) the nature of treatments provided to the defendant;

(c) what progress toward competency restoration has been made with respect to the factors identified by the court in its initial order;

(d) the defendant's current level of mental disorder or mental retardation and need for treatment, if any; and

(e) the likelihood of restoration of competency and the amount of time estimated to achieve it.

(3) The court on its own motion or upon motion by either party or by the executive director may appoint additional mental health examiners to examine the defendant and advise the court on his current mental status and progress toward competency restoration.

(4) Upon receipt of the full report, the court shall hold a hearing to determine the defendant's current status. At the hearing, the burden of proving that the defendant is competent is on the proponent of competency. Following the hearing, the court shall determine by a preponderance of evidence whether the defendant is:

(a) competent to stand trial;

(b) incompetent to stand trial with a substantial probability that the defendant may become competent in the foreseeable future; or

(c) incompetent to stand trial without a substantial probability that the defendant may become competent in the foreseeable future.

(5) (a) If the court enters a finding pursuant to Subsection (4)(a), the court shall proceed with the trial or such other procedures as may be necessary to adjudicate the charges.

(b) If the court enters a finding pursuant to Subsection (4)(b), the court may order that the defendant remain committed to the custody of the executive director of the Department of Human Services or his designee for the purpose of treatment intended to restore the defendant to competency.

(c) If the court enters a finding pursuant to Subsection (4)(c), the court shall order the defendant released from the custody of the director unless the prosecutor informs the court that commitment proceedings pursuant to Title 62A, Chapter 12, Mental Health, or Title 62A, Chapter 5, Services to People with Disabilities, will be initiated. These commitment proceedings must be initiated within seven days after the court's order entering the finding in Subsection (4)(c), unless the court enlarges the time for good cause shown. The defendant may be ordered to remain in the custody of the director until commitment proceedings have been concluded. If the defendant is committed, the court which entered the order pursuant to Subsection (4)(c), shall be notified by the director at least ten days prior to any release of the committed person.

(6) If the defendant is recommitted to the department pursuant to Subsection (5)(b), the court shall hold a hearing one year following the recommitment.

(7) At the hearing held pursuant to Subsection (6), except for defendants charged with the crimes listed in Subsection (8), a defendant who has not been

restored to competency shall be ordered released or temporarily detained pending civil commitment proceedings under the same terms as provided in Subsection (5)(c).

(8) If the defendant has been charged with aggravated murder, murder, attempted murder, manslaughter, or a first degree felony and the court determines that the defendant is making reasonable progress towards restoration of competency at the time of the hearing held pursuant to Subsection (6), the court may order the defendant recommitted for a period not to exceed 18 months for the purpose of treatment to restore the defendant to competency with a mandatory review hearing at the end of the 18-month period.

(9) Except for defendants charged with aggravated murder or murder, a defendant who has not been restored to competency at the time of the hearing held pursuant to Subsection (8) shall be ordered released or temporarily detained pending civil commitment proceedings under the same terms as provided in Subsection (5)(c).

(10) If the defendant has been charged with aggravated murder or murder and the court determines that he is making reasonable progress towards restoration of competency at the time of the mandatory review hearing held pursuant to Subsection (8), the court may order the defendant recommitted for a period not to exceed 36 months for the purpose of treatment to restore him to competency.

(11) If the defendant is recommitted to the department pursuant to Subsection (10), the court shall hold a hearing no later than at 18-month intervals following the recommitment for the purpose of determining the defendant's competency status.

(12) A defendant who has not been restored to competency at the expiration of the additional 36-month commitment period ordered pursuant to Subsection (10) shall be ordered released or temporarily detained pending civil commitment proceedings under the same terms as provided in Subsection (5)(c).

(13) In no event may the maximum period of detention under this section exceed the maximum period of incarceration which the defendant could receive if he were convicted of the charged offense. This subsection does not preclude pursuing involuntary civil commitment nor does it place any time limit on civil commitments.

(14) Neither release from a pretrial incompetency commitment under the provisions of this section nor civil commitment requires dismissal of criminal charges. The court may retain jurisdiction over the criminal case and may order periodic reviews to assess the defendant's competency to stand trial.

(15) A defendant who is civilly committed pursuant to Title 62A, Chapter 12, Mental Health, or Title 62A, Chapter 5, Services to People with Disabilities, may still be adjudicated competent to stand trial under this chapter.

(16) (a) The remedy for a violation of the time periods specified in this section, other than those specified in Subsection (5)(c), (7), (9), (12), or (13), shall be a motion to compel the hearing, or mandamus, but not release from detention or dismissal of the criminal charges.

(b) The remedy for a violation of the time periods specified in Subsection (5)(c), (7), (9), (12), or (13) shall not be dismissal of the criminal charges.

(17) In cases in which the treatment of the defendant is precluded by court order for a period of time, that time period may not be considered in computing time limitations under this section.

(18) At any time that the defendant becomes competent to stand trial, the clinical director of the hospital or other facility or the executive director of the Department of Human Services shall certify that fact to the court. The court shall conduct a hearing within 15 working days of the receipt of the clinical director's or executive director's report, unless the court enlarges the time for good cause.

(19) The court may order a hearing or rehearing at any time on its own motion or upon recommendations of the clinical director of the hospital or other facility or the executive director of the Department of Human Services.

(20) Notice of a hearing on competency to stand trial shall be given to the prosecuting attorney. If the hearing is held in the county where the defendant is confined, notice shall also be given to the prosecuting attorney for that county.

History: C. 1953, 77-15-6, enacted by L. 1980, ch. 15, § 2; 1990, ch. 306, § 5; 1991, ch. 5, § 92; 1991, ch. 207, § 44; 1991, ch. 292, § 4; 1993, ch. 285, § 23; 1994, ch. 162, § 5.

Amendment Notes. — The 1991 amendment by ch. 5, effective February 11, 1991, substituted "Department of Human Services" for "Department of Social Services" at the end of the first sentence of Subsection (2)(a).

The 1991 amendment by ch. 292, effective March 20, 1991, rewrote the first sentence in Subsection (2)(a) which read "If that mentally retarded defendant presents a substantial danger to himself or others, the court shall commit him to the Utah State Training School or other secure facility operated by the Division of Services to the Handicapped within the Department of Social Services"; added Subsection (2)(b); redesignated former Subsection (2)(b) as Subsection (2)(c); and substituted "to the custody of the Department of Human Services, for" for "to a mental health or handicapped services facility or program, under the direction of the Department of Social Services, that will provide" in the first sentence in Subsection (2)(c).

The 1991 amendment by ch. 207, effective July 1, 1991, substituted "Developmental Center" for "Training School" and "for People with Disabilities" for "to the Handicapped" in the first sentence in Subsection (2)(a).

The 1993 amendment, effective July 1, 1993, inserted "or his designee" in Subsection (2)(a) and made stylistic changes.

The 1994 amendment, effective May 2, 1994, rewrote Subsection (1), which read "Except as provided in Subsection (2), if after hearing, the person is found to be incompetent, the court shall order him committed to the Utah State Hospital or to another mental health facility until the court that committed him or the district court of the county where he is confined, after notice and hearing, finds that he is competent to proceed"; deleted former Subsection (2), pertaining to procedure where a mentally retarded defendant is found to be incompetent and will remain incompetent indefinitely; added present Subsections (2) and (3) and Subsections (4) to (19); designated former Subsection (3) as Subsection (20) and rewrote the first sentence, which read "Notice of a hearing on competency to proceed shall be given to the prosecuting attorney for the county from which the defendant was committed"; and made stylistic changes.

Cross-References. — Utah State Hospital and other mental health facilities, § 62A-12-201 et seq.

NOTES TO DECISIONS

ANALYSIS

Cost of care.
Treatment.
—Forced medication.

Cost of care.

Guardian of one declared insane prior to determination of guilt in criminal prosecution, and committed to state hospital, could not be compelled to pay cost of his ward's care and treatment. The ward's commitment was part and parcel of the administration of the criminal law, although he was never convicted of a crime. Ollerton v. Diamenti, 521 P.2d 899 (Utah 1974).

Treatment.

—Forced medication.

The forcible administration of anti-psychotic medication to a patient committed under this section violated the due process clause of the Fourteenth Amendment to the United States Constitution, as the state's interest in trying the patient for murder did not override the patient's liberty interest, and the policy for administration of medications did not address

any requisite findings. Woodland v. Angus, 820 F. Supp. 1497 (D. Utah 1993).

COLLATERAL REFERENCES

Utah Law Review. — The "Mentally Ill" and the Law: Sisyphus and Zeus, 1968 Utah L. Rev. 1.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 112, 113.

Key Numbers. — Mental Health ⚷ 436 to 438.

77-15-7. Statute of limitations and speedy trial — Effect of incompetency of defendant.

(1) The statute of limitations is tolled during any period in which the defendant is adjudicated incompetent to proceed.

(2) Any period of time during which the defendant has been adjudicated incompetent and any period during which he is being evaluated for competency may not be computed in determining the defendant's speedy trial rights.

History: C. 1953, 77-15-7, enacted by L. 1994, ch. 162, § 6.

Repeals and Reenactments. — Laws 1994, ch. 162, § 6 repeals former § 77-15-7, as last amended by Laws 1993, ch. 285, § 24, relating to hearings on the petition of persons committed after a finding of incompetency, and enacts the present section, effective May 2, 1994.

77-15-8. Bail exonerated on commitment of defendant.

When a defendant awaiting trial is committed to a mental health facility, bail shall be exonerated.

History: C. 1953, 77-15-8, enacted by L. 1980, ch. 15, § 2.

77-15-9. Expenses.

(1) In determining the competence of a defendant to proceed, expenses of examination, observation, or treatment, excluding travel to and from any mental health facility, shall be charged to the Department of Human Services when the offense is a state offense. Travel expenses incurred by the defendant shall be charged to the county where prosecution is commenced. Examination of defendants on local ordinance violations shall be charged by the department to the municipality or county commencing the prosecution.

(2) When examination is initiated by the court or on motion of the prosecutor, expenses of commitment and treatment of the person confined to a mental health facility after examination, if he is determined to be incompetent to proceed, shall also be charged to the department.

(3) Expenses of examination, treatment, or confinement in a mental health facility for any person who has been convicted of a crime and placed in a state correctional facility shall be charged to the Department of Corrections.

(4) If the defendant, after examination, is found to be competent by the court, all subsequent costs are charged to the county commencing prosecution. If the defendant requested the examination and is found to be competent by

the court, the department may recover the expenses of the examination from the defendant.

History: C. 1953, 77-15-9, enacted by L. 1980, ch. 15, § 2; 1986, ch. 120, § 4; 1989, ch. 197, § 2; 1991, ch. 166, § 5; 1994, ch. 162, § 7.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, rewrote the section to such an extent that a detailed analysis is impracticable.

The 1994 amendment, effective May 2, 1994, inserted "by the court" in two places in Subsection (4).

Cross-References. — County charges, § 17-15-17.

CHAPTER 16

MENTAL EXAMINATION AFTER CONVICTION

Section
77-16-1. Grounds for ordering examination.
77-16-2. Appointment of examining alienists — Report — Additional evidence by defendant — Findings — Sentencing — Compensation of alienists.
77-16-3. Care and treatment of persons committed.
77-16-4. Defendant incapable of treatment at state hospital — Hearing — Proceeding.
77-16-5. Recovery of committed person — Certification to Board of Pardons and Parole.

77-16-1. Grounds for ordering examination.

Whenever any person is convicted of or pleads guilty to rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, aggravated kidnaping, aggravated assault, mayhem, or an attempt to commit any of the foregoing crimes, and when it appears to the court either upon its own observation or upon evidence otherwise presented, that the defendant may be suffering from any form of mental disease or defect which may have substantially contributed to the commission of the offense, the court shall order a mental examination of that person.

History: C. 1953, 77-16-1, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Sex offenses generally, § 76-5-401 et seq.

NOTES TO DECISIONS

In general.

This section imposes a mandatory obligation on a trial judge to order a mental examination if there is evidence that the defendant suffered from a "mental disease or defect" which may have "substantially contributed" to the crime. State v. DePlonty, 749 P.2d 621 (Utah 1987).

Where defendant had already been given a mental examination by two court-appointed mental health experts, as required by § 77-14-4, pursuant to the defendant's assertion of the defense of diminished capacity, no additional mental examination under this section was necessary. State v. DePlonty, 749 P.2d 621 (Utah 1987).

COLLATERAL REFERENCES

Utah Law Review. — The "Mentally Ill" and the Law: Sisyphus and Zeus, 1968 Utah L. Rev. 1.

Brigham Young Law Review. — Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees, 1983 B.Y.U. L. Rev. 499.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 37 et seq.; 41 Am. Jur. 2d Incompetent Persons §§ 49 to 54.

A.L.R. — Standard of proof required under statute providing for commitment of sexual offenders or sexual psychopaths, 96 A.L.R.3d 840.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Key Numbers. — Mental Health ⚬= 434, 441 to 449.

77-16-2. Appointment of examining alienists — Report — Additional evidence by defendant — Findings — Sentencing — Compensation of alienists.

(1) The examination of the defendant shall be conducted by two or more alienists appointed by the judge. Upon completion of the examination but not later than 30 days after the order directing the examination, a written report of the results shall be provided to the sentencing judge. If the report discloses that the person is not suffering from any form of mental disease or defect which may have substantially contributed to the commission of the offense, the judge, after affording the defendant an opportunity to see the report, may impose sentence. Prior to the imposition of sentence, if the defendant so desires, he may offer additional evidence on the question of his mental condition.

(2) If the report or other evidence presented to the court discloses that the defendant suffers from any form of mental disease or defect which substantially contributed to the commission of the offense, but which was not of such magnitude as to preclude sentence, the judge shall make written findings of fact as to the defendant's condition and order him committed to the Utah state prison or other facility for indefinite confinement for treatment until the defendant is otherwise released pursuant to this chapter.

(3) The judge shall fix the compensation, if any, to be paid the examining alienists and upon certification of the amount of compensation by the judge, the county executive in the county wherein the offense was committed shall make payment.

History: C. 1953, 77-16-2, enacted by L. 1980, ch. 15, § 2; 1993, ch. 227, § 388.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, substituted "county executive" for "board of county commissioners" in Subsection (3).

NOTES TO DECISIONS

Arrest of judgment.

When an alienist specifically found defendant competent to proceed to sentencing, trial court did not err in refusing to arrest judgment despite the fact that defendant may have suffered from an undetermined "mental illness." State v. Cantu, 750 P.2d 591 (Utah 1988).

77-16-3. Care and treatment of persons committed.

The clinical director of the Utah State Hospital shall provide for the treatment and care of persons committed to the hospital under this chapter

and shall render treatment which in his judgment is best suited to care for the needs of such persons.

History: C. 1953, 77-16-3, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Utah State Hospital, § 62A-12-201 et seq.

COLLATERAL REFERENCES

A.L.R. — Right of state prison authorities to administer neuroleptic or antipsychotic drugs to prisoner without his or her consent — state cases, 75 A.L.R.4th 1124.

77-16-4. Defendant incapable of treatment at state hospital — Hearing — Proceeding.

If the clinical director of the state hospital concludes, or the defendant contends, that the defendant is not capable of receiving treatment, or that appropriate treatment is not available at the hospital, either may petition the sentencing court to return the defendant before the court for further proceedings. If the court finds that the defendant is not capable of receiving treatment, or that appropriate treatment is not available at that hospital for the defendant, he shall proceed the same as if the defendant had not been proceeded against under this chapter, with credit being given for the time spent at the hospital.

History: C. 1953, 77-16-4, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Escape of criminal from state hospital a class A misdemeanor, § 62A-12-226.

77-16-5. Recovery of committed person — Certification to Board of Pardons and Parole.

(1) (a) A person committed to the state hospital after sentence who has sufficiently recovered from his mental disease or defect shall be certified to the Board of Pardons and Parole by the clinical director.

(b) Upon certification, jurisdiction over the person shall be transferred to the Board of Pardons and Parole and he shall be pardoned, paroled or confined in the state prison for the unexpired term for the offense as provided by law with credit for time served while confined at the hospital. The certification of the clinical director of the hospital shall specify with particularity the medical facts justifying his certification.

(2) The provisions of law and the rules and regulations promulgated pursuant thereto, regarding parole shall apply to persons paroled from the state hospital.

History: C. 1953, 77-16-5, enacted by L. 1980, ch. 15, § 2; 1994, ch. 13, § 22.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, in Subsection (1), added the (a) and (b) designations and substituted "Board of Pardons and Parole" for "Board of Pardons" twice.

CHAPTER 16a

COMMITMENT AND TREATMENT OF MENTALLY ILL PERSONS

Section
77-16a-1 to 77-16a-8. Repealed.

Part 1

Plea and Verdict of Guilty and Mentally Ill

77-16a-101. Definitions.
77-16a-102. Jury instructions.
77-16a-103. Plea of guilty and mentally ill.
77-16a-104. Verdict of guilty and mentally ill — Hearing to determine present mental state.

Part 2

Disposition of Defendants Found Guilty and Mentally Ill

77-16a-201. Probation.
77-16a-202. Commitment to department.

Section
77-16a-203. Review of guilty and mentally ill persons committed to department — Recommendations for transfer.
77-16a-204. UDC acceptance of transfer.
77-16a-205. Parole.

Part 3

Defendants Pleading Not Guilty by Reason of Insanity

77-16a-301. Mental examination of defendant.
77-16a-302. Persons found not guilty by reason of insanity — Disposition.
77-16a-303. Court determinations.
77-16a-304. Review after commitment.
77-16a-305. Conditional release.
77-16a-306. Continuing review — Discharge.

77-16a-1 to 77-16a-8. Repealed.

Repeals. — Laws 1992, ch. 171, § 17 repeals §§ 77-16a-1 to 77-16a-8, as enacted by L. 1990, ch. 306, §§ 6 to 13 and last amended by L. 1991, ch. 5, §§ 93 and 94, ch. 66, §§ 2 to 4, ch. 166, §§ 6 and 7, ch. 207, § 45, ch. 292, § 6, concerning mentally ill or mentally retarded defendants, effective July 1, 1992.

PART 1

PLEA AND VERDICT OF GUILTY AND MENTALLY ILL

77-16a-101. Definitions.

As used in this chapter:

(1) "Board" means the Board of Pardons and Parole established under Section 77-27-2.

(2) "Department" means the Department of Human Services.

(3) "Executive director" means the executive director of the Department of Human Services.

(4) "Mental health facility" means the Utah State Hospital or other facility that provides mental health services under contract with the division, a local mental health authority, or organization that contracts with a local mental health authority.

(5) "Mentally ill" means the same as that term is defined in Section 76-2-305.

(6) "Mentally ill offender" means an individual who has been adjudicated guilty and mentally ill, including an individual who is mentally retarded.

(7) "Mentally retarded" means the same as the term "mental retardation," defined in Section 62A-5-101.

(8) "UDC" means the Department of Corrections.

History: C. 1953, 77-16a-101, enacted by L. 1992, ch. 171, § 1; 1994, ch. 13, § 23.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (1).

Compiler's Notes. — Rule 21.5, U.R.Crim.P., deals with pleas claiming mental illness or insanity. For notes from cases on that subject, see the Court Rules volume.

Cross-References. — Department of Corrections, § 64-13-2.

Department of Human Services, § 62A-1-102; executive director, § 62A-1-108.

Utah State Hospital, § 62A-12-201.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-102. Jury instructions.

If a defendant asserts a defense of not guilty by reason of insanity, the court shall instruct the jury that it may find the defendant:

(1) guilty;

(2) not guilty;

(3) not guilty by reason of insanity;

(4) guilty and mentally ill;

(5) guilty of a lesser offense;

(6) guilty of a lesser offense and mentally ill; or

(7) guilty of a lesser offense due to mental illness, but not a mental illness that warrants full exoneration.

History: C. 1953, 77-16a-102, enacted by L. 1992, ch. 171, § 2.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-103. Plea of guilty and mentally ill.

(1) Upon a plea of guilty and mentally ill being tendered by a defendant to any charge, the court shall hold a hearing within a reasonable time to determine whether the defendant is mentally ill.

(2) The court may order the department to examine the defendant, and may receive the testimony of any public or private expert witness offered by the defendant or the prosecutor. The defendant may be placed in the Utah State Hospital for that examination only upon approval by the executive director.

(3) (a) A defendant who tenders a plea of guilty and mentally ill shall be examined first by the trial judge, in compliance with the standards for taking pleas of guilty. The defendant shall be advised that a plea of guilty and mentally ill is a plea of guilty and not a contingent plea.

(b) If the defendant is later found not to be mentally ill, that plea remains a valid plea of guilty, and the defendant shall be sentenced as any other offender.

(4) If the court concludes that the defendant is currently mentally ill his plea shall be accepted and he shall be sentenced in accordance with Section 77-16a-104.

(5) (a) When the offense is a state offense, expenses of examination, observation, and treatment for the defendant shall be paid by the department.

(b) Travel expenses shall be paid by the county where prosecution is commenced.

(c) Expenses of examination for defendants charged with violation of a municipal or county ordinance shall be paid by the municipality or county that commenced the prosecution.

History: C. 1953, 77-16a-103, enacted by L. 1992, ch. 171, § 3.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

NOTES TO DECISIONS

Mental illness as issue at sentencing.
A defendant may move that the court find him mentally ill at the time of sentencing, after a finding of guilt, whether by verdict or plea; a guilty and mentally ill verdict or plea is relevant to sentencing, not the mens rea for the charged offense. State v. Murphy, 872 P.2d 480 (Utah Ct. App. 1994).

77-16a-104. Verdict of guilty and mentally ill — Hearing to determine present mental state.

(1) Upon a verdict of guilty and mentally ill for the offense charged, or any lesser offense, the court shall conduct a hearing to determine the defendant's present mental state.

(2) The court may order the department to examine the defendant to determine his mental condition, and may receive the evidence of any public or private expert witness offered by the defendant or the prosecutor. The defendant may be placed in the Utah State Hospital for that examination only upon approval of the executive director.

(3) If the court finds by clear and convincing evidence that the defendant is currently mentally ill, it shall impose any sentence that could be imposed under law upon a defendant who is not mentally ill and who is convicted of the same offense, and:

(a) commit him to the department, in accordance with the provisions of Section 77-16a-202, if it finds by clear and convincing evidence that:

(i) because of his mental illness the defendant poses an immediate physical danger to self or others, including jeopardizing his own or others' safety, health, or welfare if placed in a correctional or probation setting, or lacks the ability to provide the basic necessities of life, such as food, clothing, and shelter, if placed on probation; and

(ii) the department is able to provide the defendant with treatment, care, custody, and security that is adequate and appropriate to the defendant's conditions and needs. In order to insure that the requirements of this subsection are met, the court shall notify the executive director of the proposed placement and provide the department with an opportunity to evaluate the defendant and make a recommendation to the court regarding placement prior to commitment;

(b) order probation in accordance with Section 77-16a-201; or

(c) if the requirements of Subsections (a) and (b) are not met, place the defendant in the custody of UDC.

(4) If the court finds that the defendant is not currently mentally ill, it shall sentence the defendant as it would any other defendant.

(5) Expenses for examinations ordered under this section shall be paid in accordance with Subsection 76-16a-103(5).

History: C. 1953, 77-16a-104, enacted by L. 1992, ch. 171, § 4.

Compiler's Notes. — The reference in Subsection (5) is apparently in error; the intended reference is probably § 77-16a-103(5).

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

NOTES TO DECISIONS

Cited in State v. Murphy, 872 P.2d 480 (Utah Ct. App. 1994).

PART 2

DISPOSITION OF DEFENDANTS FOUND GUILTY AND MENTALLY ILL

77-16a-201. Probation.

(1) (a) When the court proposes to place on probation a defendant who has pled or is found guilty and mentally ill, it shall request UDC to provide a presentence investigation report regarding whether probation is appropriate for that defendant and, if so, recommending a specific treatment program. If the defendant is placed on probation, that treatment program shall be made a condition of probation, and the defendant shall remain under the jurisdiction of the sentencing court.

(b) The court may not place a mentally ill offender who has been convicted of a capital offense on probation.

(2) The period of probation may be for no less than five years, or until the expiration of the defendant's sentence, whichever occurs first. Probation may not be subsequently reduced by the sentencing court without consideration of an updated report on the mental health status of the defendant.

(3) (a) Treatment ordered by the court under this section may be provided by or under contract with the department, a mental health facility, a local mental health authority, or, with the approval of the sentencing court, any other public or private mental health provider.

(b) The entity providing treatment under this section shall file a report with the defendant's probation officer at least every six months during the term of probation.

(c) Any request for termination of probation regarding a defendant who is receiving treatment under this section shall include a current mental health report prepared by the treatment provider.

(4) Failure to continue treatment or any other condition of probation, except by agreement with the entity providing treatment and the sentencing court, is a basis for initiating probation violation hearings.

(5) The court may not release a mentally ill offender into the community, as a part of probation, if it finds by clear and convincing evidence that he:

(a) poses an immediate physical danger to himself or others, including jeopardizing his own or others' safety, health, or welfare if released into the community; or

(b) lacks the ability to provide the basic necessities of life, such as food, clothing, and shelter, if released into the community.

(6) A mentally ill offender who is not eligible for release into the community under the provisions of Subsection (5) may be placed by the court, on probation, in an appropriate mental health facility.

History: C. 1953, 77-16a-201, enacted by L. 1992, ch. 171, § 5.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-202. Commitment to department.

(1) In sentencing and committing a mentally ill offender to the department under Subsection 77-16a-104(3)(a), the court shall:

(a) sentence the offender to a term of imprisonment and order that he be committed to the department for care and treatment until transferred to UDC in accordance with Sections 77-16a-203 and 77-16a-204; or

(b) sentence the offender to a term of imprisonment and order that he be committed to the department for care and treatment for no more than 18 months, or until he has reached maximum benefit, whichever occurs first. At the expiration of that time, the court may recall the sentence and commitment, and resentence the offender. A commitment and retention of jurisdiction under this subsection shall be specified in the sentencing order. If that specification is not included in the sentencing order, the offender shall be committed in accordance with Subsection (a).

(2) The court may not retain jurisdiction, under Subsection (1)(b), over the sentence of a mentally ill offender who has been convicted of a capital offense. In capital cases, the court shall make the findings required by this section after the capital sentencing proceeding mandated by Section 76-3-207.

(3) When an offender is committed to the department under Subsection (1)(b), the department shall provide the court with reports of the offender's mental health status every six months. Those reports shall be prepared in accordance with the requirements of Section 77-16a-203. Additionally, the court may appoint an independent examiner to assess the mental health status of the offender.

(4) The period of commitment may not exceed the maximum sentence imposed by the court. Upon expiration of that sentence, the administrator of the facility where the offender is located may initiate civil proceedings for involuntary commitment in accordance with Title 62A, Chapter 12 or Title 62A, Chapter 5.

History: C. 1953, 77-16a-202, enacted by L. 1992, ch. 171, § 6.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-203. Review of guilty and mentally ill persons committed to department — Recommendations for transfer.

(1) The executive director shall designate a review team of at least three qualified staff members, including at least one licensed psychiatrist, to evaluate the mental condition of each mentally ill offender committed to it in accordance with Section 77-16a-202, at least once every six months. If the offender is mentally retarded, the review team shall include at least one individual who is a designated mental retardation professional, as defined in Section 62A-5-301.

(2) At the conclusion of its evaluation, the review team described in Subsection (1) shall make a report to the executive director regarding the offender's current mental condition, his progress since commitment, prognosis,

and a recommendation regarding whether the mentally ill offender should be transferred to UDC or remain in the custody of the department.

(3) (a) The executive director shall notify the UDC medical administrator, and the board's mental health adviser that a mentally ill offender is eligible for transfer to UDC if the review team finds that the offender:

(i) is no longer mentally ill; or

(ii) is still mentally ill and continues to be a danger to himself or others, but can be controlled if adequate care, medication, and treatment are provided, and that he has reached maximum benefit from the programs within the department.

(b) The administrator of the mental health facility where the offender is located shall provide the UDC medical administrator with a copy of the reviewing staff's recommendation and:

(i) all available clinical facts;

(ii) the diagnosis;

(iii) the course of treatment received at the mental health facility;

(iv) the prognosis for remission of symptoms;

(v) the potential for recidivism;

(vi) an estimation of the offender's dangerousness, either to himself or others; and

(vii) recommendations for future treatment.

History: C. 1953, 77-16a-203, enacted by L. 1992, ch. 171, § 7.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

NOTES TO DECISIONS

Applicability.

Trial court's order calling for the application of this section to the possible transfer of defendant from the State Training School to the Utah State Prison was not a retroactive application of the statute even though a different procedure was contained in the law in force at the time defendant was sentenced. State v. Burgess, 870 P.2d 276 (Utah Ct. App. 1994).

77-16a-204. UDC acceptance of transfer.

(1) The UDC medical administrator shall designate a transfer team of at least three qualified staff members, including at least one licensed psychiatrist, to evaluate the recommendation made by the department's review team pursuant to Section 77-16a-203. If the offender is mentally retarded, the transfer team shall include at least one person who has expertise in testing and diagnosis of mentally retarded individuals.

(2) The transfer team shall concur in the recommendation if it determines that UDC can provide the mentally ill offender with the level of care necessary to maintain his mental condition.

(3) The UDC transfer team and medical administrator shall recommend the facility in which the offender should be placed and the treatment to be provided in order for his mental condition to remain stabilized to the director of the Division of Institutional Operations, within the Department of Corrections.

(4) In the event that the department and UDC do not agree on the transfer of a mentally ill offender, the administrator of the mental health facility where the offender is located shall notify the mental health adviser for the board, in writing, of the dispute. The mental health adviser shall be provided with copies of all reports and recommendations. The board's mental health adviser shall

make a recommendation to the board on the transfer and the board shall issue its decision within 30 days.

(5) UDC shall notify the board whenever a mentally ill offender is transferred from the department to UDC.

History: C. 1953, 77-16a-204, enacted by L. 1992, ch. 171, § 8.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-205. Parole.

(1) When a mentally ill offender who has been committed to the department becomes eligible to be considered for parole, the board shall request a recommendation from the executive director and from UDC before placing the offender on parole.

(2) Before setting a parole date, the board shall request that its mental health adviser prepare a report regarding the mentally ill offender, including:

(a) all available clinical facts;

(b) the diagnosis;

(c) the course of treatment received at the mental health facility;

(d) the prognosis for remission of symptoms;

(e) potential for recidivism;

(f) an estimation of the mentally ill offender's dangerousness either to himself or others; and

(g) recommendations for future treatment.

(3) Based on the report described in Subsection (2), the board may place the mentally ill offender on parole. The board may require mental health treatment as a condition of parole. If treatment is ordered, failure to continue treatment, except by agreement with the treatment provider, and the board, is a basis for initiation of parole violation hearings by the board.

(4) UDC, through Adult Probation and Parole, shall monitor the status of a mentally ill offender who has been placed on parole. UDC may provide treatment by contracting with the department, a local mental health authority, any other public or private provider, or in-house staff.

(5) The period of parole may be no less than five years, or until expiration of the defendant's sentence, whichever occurs first. The board may not subsequently reduce the period of parole without considering an updated report on the offender's current mental condition.

History: C. 1953, 77-16a-205, enacted by L. 1992, ch. 171, § 9.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

PART 3

DEFENDANTS PLEADING NOT GUILTY BY REASON OF INSANITY

77-16a-301. Mental examination of defendant.

(1) When the court receives notice that a defendant intends to claim that he is not guilty by reason of insanity or that he had diminished mental capacity, the court shall order the Department of Human Services to examine the defendant and investigate his mental condition. The person or organization

directed by the department to conduct the examination shall testify at the request of the court or either party in any proceeding in which the testimony is otherwise admissible. Pending trial, unless the court or the executive director directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(2) The defendant shall make himself available and fully cooperate in the examination by the department and any other independent examiners for the defense and the prosecuting attorney. If the defendant fails to make himself available and fully cooperate, and that failure is established to the satisfaction of the court at a hearing prior to trial, the defendant is barred from presenting expert testimony relating to his defense of mental illness at the trial of the case. The department shall complete the examination within 30 days after the court's order, and shall prepare and provide to the court prosecutor and defense counsel a written report concerning the condition of the defendant.

(3) Within ten days after receipt of the report from the department, but not later than five days before the trial of the case, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of mental illness, which shall contain the names of witnesses the prosecuting attorney proposes to call in rebuttal.

(4) The reports of any other independent examiner are admissible as evidence upon stipulation of the prosecution and defense.

(5) This section does not prevent any party from producing any other testimony as to the mental condition of the defendant. Expert witnesses who are not appointed by the court are not entitled to compensation under Subsection (7).

(6) This section does not require the admission of evidence not otherwise admissible.

(7) Expenses of examination ordered by the court under this section shall be paid by the Department of Human Services. Travel expenses associated with the examination incurred by the defendant shall be charged by the department to the county where prosecution is commenced. Examination of defendants charged with violation of municipal or county ordinances shall be charged by the department to the entity commencing the prosecution.

History: C. 1953, 77-16a-301, enacted by L. 1992, ch. 171, § 10.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-302. Persons found not guilty by reason of insanity — Disposition.

(1) Upon a verdict of not guilty by reason of insanity, the court shall conduct a hearing within ten days to determine whether the defendant is currently mentally ill. The defense counsel and prosecutors may request further evaluations and present testimony from those examiners.

(2) After the hearing and upon consideration of the record, the court shall order the defendant committed to the department if it finds by clear and convincing evidence that:

(a) the defendant is still mentally ill; and

(b) because of that mental illness the defendant presents a substantial danger to himself or others.

(3) The period of commitment described in Subsection (2) may not exceed the period for which the defendant could be incarcerated had he been convicted

and received the maximum sentence for the crime of which he was accused. At the time that period expires, involuntary civil commitment proceedings may be instituted in accordance with Title 62A, Chapter 12.

History: C. 1953, 77-16a-302, enacted by L. 1992, ch. 171, § 11.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

Cross-References. — Hearing on plea of guilty and mentally ill, Rule 21.5, U.R.Cr.P.

Inquiry into sanity of defendant, § 77-15-1 et seq.

Utah State Hospital and other mental health facilities, § 62A-12-201 et seq.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Dangerous propensity.
Dual civil and criminal commitment.
Instructions to jury.
Release from commitment.

Constitutionality.

It is constitutionally permissible to differentiate in the treatment and standards of review for release between involuntary civil commitments and criminal commitments; placing the burden of proof on criminally committed individual in criminal release proceedings does not deny equal protection of the laws. State v. Lindquist, 674 P.2d 1234 (Utah 1984).

Dangerous propensity.

In the absence of a finding of mental illness, a dangerous propensity is not, by itself, sufficient to justify the continuation of an involuntary commitment under this section. State v. Murphy, 760 P.2d 280 (Utah 1988).

Dual civil and criminal commitment.

Where court denied request for release by an individual who had been found not guilty by reason of insanity and who had been committed under the criminal commitment statute, and at the same time also ordered the individual to be committed civilly under the statute for involuntary civil commitment, such dual commitment, while unnecessary and superfluous, did not violate the individual's constitutional due process and equal protection rights; however, if state chooses to impose and support such a commitment it must also comply with the strictures of both the civil and criminal statutes and provide the individual with all the hearings and commitment review he is entitled to under each statute. State v. Lindquist, 674 P.2d 1234 (Utah 1984).

Instructions to jury.

Trial court's refusal, in its general charge to the jury, to give a requested instruction explaining the consequences of a verdict of not guilty by reason of insanity, one of the four verdict forms given the jury, was reversible error. State v. Shickles, 760 P.2d 291 (Utah 1988).

Release from commitment.

Criminal defendant found not guilty by reason of insanity and committed to the state hospital was not entitled to release on the grounds that his symptoms of mental illness could be controlled if he took his medication where there was evidence that he would not take the medication and that without the medication he was a danger to himself and to others. State v. Jacob, 669 P.2d 865 (Utah 1983).

In determining question of criminal defendant's release from commitment, trial court's application of "recovery from mental illness," the standard under the current law, rather than the standard of "recovery of sanity," the standard applying at the time the crime was committed, did not constitute a retroactive increase in punishment in violation of the prohibition against an ex post facto law, Utah Const., Art. I, § 18, because the law in question does not increase punishment, but regulates procedures and treatment. State v. Jacob, 669 P.2d 865 (Utah 1983).

This section did not authorize the conditional release of persons who had been found not guilty by reason of insanity. State v. Jacob, 669 P.2d 865 (Utah 1983).

COLLATERAL REFERENCES

Utah Law Review. — The "Mentally Ill" and the Law: Sisyphus and Zeus, 1968 Utah L. Rev. 1.

Brigham Young Law Review. — Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees, 1983 B.Y.U. L. Rev. 499, 587.

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 83 to 94.

C.J.S. — 22 C.J.S. Criminal Law § 58 et seq.; 44 C.J.S. Insane Persons §§ 129, 131.

A.L.R. — Validity of conditions imposed when releasing person committed to institution

as consequence of acquittal of crime on ground of insanity, 2 A.L.R.4th 934.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Key Numbers. — Mental Health ⚬= 434, 439.

77-16a-303. Court determinations.

After entry of judgment of not guilty by reason of insanity, the court shall:

(1) determine on the record the offense of which the person otherwise would have been convicted and the maximum sentence he could have received; and

(2) make specific findings regarding whether there is a victim of the crime for which the defendant has been found not guilty by reason of insanity and, if so, whether the victim wishes to be notified of any conditional release, discharge, or escape of the defendant.

History: C. 1953, 77-16a-303, enacted by L. 1992, ch. 171, § 12.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-304. Review after commitment.

(1) The executive director, or his designee, shall establish a review team of at least three qualified staff members to review the defendant's mental condition at least every six months. That team shall include at least one psychiatrist and, if the defendant is mentally retarded, at least one staff member who is a designated mental retardation professional, as defined in Section 62A-5-301.

(2) If the review team described in Subsection (1) finds that the defendant has recovered from his mental illness, or, that the defendant is still mentally ill but does not present a substantial danger to himself or others, the executive director, or his designee, shall notify the court that committed the defendant that the defendant is a candidate for discharge and shall provide the court with a report stating the facts that form the basis for the recommendation.

(3) The court shall conduct a hearing within ten business days after receipt of the executive director's, or his designee's, notification. The court clerk shall notify the prosecuting attorney, the defendant's attorney, and any victim of the crime for which the defendant was found not guilty by reason of insanity, of the date and time of hearing.

(4) (a) If the court finds that the person is no longer mentally ill, or if mentally ill, no longer presents a substantial danger to himself or others, it shall order the defendant to be discharged from commitment.

(b) If the court finds that the person is still mentally ill and is a substantial danger to himself or others, but can be controlled adequately if conditionally released with treatment as a condition of release, it shall order the person conditionally released in accordance with Section 77-16a-305.

(c) If the court finds that the defendant has not recovered from his mental illness and is a substantial danger to himself or others and cannot adequately be controlled if conditionally released on supervision, the court shall order that the commitment be continued.

(d) The court may not discharge an individual whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that without continued

medication or hospitalization the defendant's mental illness will reoccur, making him a substantial danger to himself or others. That person may, however, be a candidate for conditional release, in accordance with Section 77-16a-305.

History: C. 1953, 77-16a-304, enacted by L. 1992, ch. 171, § 13; 1993, ch. 285, § 25.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, inserted "or his designee" in Subsections (1) through (3), substituted "Section 62A-5-301" for "Section 62A-5-302" in Subsection (1), and made stylistic changes.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-305. Conditional release.

(1) If the review team finds that a defendant is not eligible for discharge, in accordance with Section 77-16a-304, but that his mental illness and dangerousness can be controlled with proper care, medication, supervision, and treatment if he is conditionally released, the review team shall prepare a report and notify the executive director, or his designee, that the defendant is a candidate for conditional release.

(2) The executive director, or his designee, shall prepare a conditional release plan, listing the type of care and treatment that the individual needs and recommending a treatment provider.

(3) The executive director, or his designee, shall provide the court, the defendant's attorney, and the prosecuting attorney with a copy of the report issued by the review team under Subsection (1), and the conditional release plan. The court shall conduct a hearing on the issue of conditional release within 30 days after receipt of those documents.

(4) The court may order that a defendant be conditionally released if it finds that, even though the defendant presents a substantial danger to himself or others, he can be adequately controlled with supervision and treatment that is available and provided for in the conditional release plan.

(5) The department may provide treatment or contract with a local mental health authority or other public or private provider to provide treatment for a defendant who is conditionally released under this section.

History: C. 1953, 77-16a-305, enacted by L. 1992, ch. 171, § 14; 1993, ch. 285, § 26.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, inserted "or his designee" in Subsections (1) through (3).

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

77-16a-306. Continuing review — Discharge.

(1) Each entity that provides treatment for a defendant committed to the department as not guilty by reason of insanity under this part shall review the status of each defendant at least once every six months. If the treatment provider finds that a defendant has recovered from his mental illness, or if still mentally ill, no longer presents a substantial danger to himself or others, it shall notify the executive director of its findings.

(2) Upon receipt of notification under Subsection (1), the executive director shall designate a review team, in accordance with Section 77-16a-304, to evaluate the defendant. If that review team concurs with the treatment provider's assessment, the executive director shall notify the court, the defendant's attorney, and the prosecuting attorney that the defendant is a

candidate for discharge. The court shall conduct a hearing, in accordance with Section 77-16a-302, within ten business days after receipt of that notice.

(3) The court may not discharge an individual whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that without continued medication or hospitalization the defendant's mental illness will reoccur, making the defendant a substantial danger to himself or others.

History: C. 1953, 77-16a-306, enacted by L. 1992, ch. 171, § 15.

Effective Dates. — Laws 1992, ch. 171, § 18 makes the act effective on July 1, 1992.

CHAPTER 17
THE TRIAL

Section	
77-17-1.	Doubt as to degree — Conviction only on lowest.
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77-17-4.	Conspiracy — Pleading — Evidence — Proof necessary.
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77-17-6.	Lottery tickets — Evidence.
77-17-7.	Conviction on testimony of accomplice — Instruction to jury.
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77-17-9.	Separation or sequestration of jurors — Oath of officer having custody.
77-17-10.	Court to determine law; the jury, the facts.
77-17-11.	Jury to retire for deliberation — Oath of officer having custody.
77-17-12.	Defendant on bail appearing for trial may be committed.
77-17-13.	Expert testimony generally — Notice requirements.

77-17-1. Doubt as to degree — Conviction only on lowest.

When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree.

History: C. 1953, 77-17-1, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Included offenses, what constitutes, when jury to be charged, § 76-1-402.

NOTES TO DECISIONS

ANALYSIS

Included offenses.
Instructions.
Jury consideration of lesser offenses.

Included offenses.

In prosecution for persistent violation of former Liquor Prohibition Law, charge of unlawful possession was included within charge of persistent violation, and where prior conviction was not proved beyond reasonable doubt, conviction could be had only for lesser offense of unlawful possession. State v. Bruno, 69 Utah 444, 256 P. 109 (1927).

Instructions.

In murder prosecution, instruction that jury "can," instead of "must," convict defendant of lowest degree in case there was reasonable doubt of which of two or more degrees defendant was guilty, was proper. State v. Cerar, 60 Utah 208, 207 P. 597 (1922).

Court should submit to the jury the lower grades of the crime charged, if there is any evidence to support such an instruction. State v. Ferguson, 74 Utah 263, 279 P. 55 (1929).

In prosecution for larceny of suitcase, court did not err in refusing defendant's instruction on lesser included offenses, in view of adequate instruction given by court. State v. Campbell,