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Competency to Stand Trial in Nebraska

Wayne Kreuscher
University of Nebraska College of Law, wkreuscher@goldbergsegalla.com

Comment

COMPETENCY TO STAND TRIAL IN NEBRASKA

In Nebraska the procedure for determining whether a defendant is mentally competent to stand trial is discretionary with the court.[1] Unlike the New York Criminal Procedure Law,[2] described by H.H.A. Cooper in the preceding article,[3] the Nebraska statutes[4] do not require a judge to order a psychiatric examination of a de-

1. "At common law it was for the court to determine whether a defendant was mentally fit to be put on trial or sentenced and the nature of the investigation to be made on the issue of sanity was vested in the sound discretion of the court. . . . The adoption of section 29-1823, . . . referring to delay in the trial of one mentally incompetent, does not change the common law in such cases but leaves it in the discretion of the court." State v. Anderson, 186 Neb. 435, 437, 183 N.W.2d 766, 768 (1971).
2. N.Y. CODE CRIM. PROC. § 730 *et. seq.* (McKinney 1971).
3. *Fitness To Proceed* 45-68 *infra.*
4. NEB. REV. STAT. § 29-1822 (Reissue 1964): "A person who becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue; and if, after judgment and before execution of the sentence such person shall become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the insanity or lunacy."
NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972): "If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or any person for the accused. The judge of the district court of the county wherein the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric or psychological examination of the accused to be made as he deems warranted and hold such hearing as he deems necessary. Should he determine after a hearing that the accused is mentally incompetent to stand trial he shall order the accused to be committed to a state hospital for the mentally ill until such time as the disability may be removed. The cost of such an examination, when ordered by the court, shall be the expense of the county wherein the crime is charged. The district judge may allow any physician, psychiatrist or psychologist a reasonable fee for his services which amount, when determined by the district judge, shall be certified to the county board who shall cause payment to be made."

fendant whose mental competency to stand trial or to be sentenced is in doubt.[5] Cooper's basic message is that judges must be aware that mental competency is neither completely a medical nor a legal question. This conclusion applies to Nebraska judges as well as to their New York counterparts; although Nebraska judges are not required to seek medical opinions, the law says they may,[6] and often they do.[7] When the Nebraska judge does order a medical examination, the possibility exists that the judge will consider medical opinions determinative of the competency issue. If Cooper were to speak to Nebraska judges, he probably would encourage them to use medical opinions when deciding if a defendant has a mental defect or illness that might interfere with his competency to stand trial or to be sentenced. But he also would warn them, as he did the New York judges, that doctors are not qualified to determine the complex legal issue of whether the accused understands the proceedings and is able to assist in his defense.

This article will concentrate on how the Nebraska judge should best use medical opinions to determine whether a defendant is mentally competent. After comparing Nebraska and New York laws in this area, the article will recommend that one of the Nebraska statutes concerned with competency to stand trial or to be sentenced be repealed and that the other statute be expanded and revised. These statutory changes would not alter the present mental competency law in Nebraska, but they would clarify the defendant's rights and the proper roles of the judge and the medical experts.

Nebraska has two statutes[8] concerned with the determination of whether a defendant is mentally competent to stand trial or to be sentenced. Section 29-1823, approved by the Unicameral in 1967,[9] concerns only the question of mental competency *"at any time prior to trial."*[10] The major portion of section 29-1822, which is ninety-

5. However, if a district court judge determines that a convict "under sentence of death" might be "insane," he "shall" appoint the three superintendents of the state hospitals at Lincoln, Hastings and Norfolk to examine the convict. And if two of the commission members find the convict "insane," the judge "shall" suspend his execution until further order. NEB. REV. STAT. § 29-2509 (Cum. Supp. 1972).
6. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972).
7. *See, e.g.*, State v. Klatt, 187 Neb. 274, 276, 188 N.W.2d 821, 823 (1971), where a Nebraska district court ordered the defendant transferred for psychiatric examination after applications by both the defendant and the state.
8. NEB. REV. STAT. §§ 29-1822 (Reissue 1964); 29-1823 (Cum. Supp. 1972).
9. Neb. Laws c. 174, p. 489 (1967).
10. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972) (Emphasis added).

nine years old,[11] concentrates on a defendant's "lunacy or insanity" *"after the verdict of guilty"* and *"before judgment [is] pronounced."*[12] A comparison of these statutes with the New York law shows that the newer statute is more pertinent. The older statute, considered later in this article, uses archaic language that confuses the issue of mental competency.

A comparison of New York law and Nebraska's section 29-1823 shows that in both states the issue of competency initially rests with the judge's discretion. New York's procedure for determining mental incompetence does not begin unless the court is "of the opinion that the defendant may be an incapacitated person."[13] Nebraska's statute provides that after the county attorney, the accused or any person for the accused has brought the incompetency issue to the court, the district court judge "shall have the authority to determine whether or not the accused is competent to stand trial."[14]

After the New York judge has decided that the defendant may be incapacitated, however, he "must"[15] follow a detailed procedure which includes psychiatric examinations and possible hearings. In contrast, section 29-1823 provides that the Nebraska judge "may also cause such medical, psychiatric or psychological examination of the accused to be made as he deems warranted and hold such hearings as he deems necessary."[16] Clearly, the New York judge's discretion is greatly limited after his initial decision that a doubt exists, but the Nebraska judge's discretion continues.

The Nebraska Supreme Court has not considered whether the statute requires a judge to order medical examinations. The court has held, however, that a hearing on a defendant's mental competency rests within the "sound discretion" of the trial judge.[17] The

11. Neb. Laws c. 42, § 454 (1873), *as revised,* 2 Statute Commission Rep., 56th Neb. Leg. Sess., § 29-1822 (1943). The 1943 Statute Commission made only one major change in the law. This was the deletion of the law's last sentence which had provided, "In all such cases it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of the empaneling, insane or lunatic." The "Revisor's Note" explained that this sentence was omitted because it was held in *Grammer v. Fenton,* 104 Neb. 744, 746, 178 N.W. 624, 625 (1920), that the sentence had been impliedly repealed by NEB. REV. STAT. § 29-2509 (1943). [At the time of *Grammer* this was NEB. REV. STAT. § 9212 (1913).] *See* note 5 *supra.*
12. NEB. REV. STAT. § 29-1822 (Reissue 1964) (Emphasis added).
13. N.Y. CODE CRIM. PROC. § 730.30(1) (McKinney 1971).
14. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972).
15. N.Y. CODE CRIM. PROC. § 730.30(1) (McKinney 1971).
16. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972).
17. State v. Boston, 187 Neb. 388, 389, 191 N.W.2d 452, 453 (1971). *See also* State v. Anderson, 186 Neb. 435, 437-38, 183 N.W.2d 766, 768

court probably would come to the same conclusion concerning medical examinations because the statutory sentence providing that a judge may hold such hearing "as he deems necessary" also states that he may order medical examinations "as he deems warranted."[18] The phrases "as he deems necessary" and "as he deems warranted" are equally discretionary.

Not only does the language of section 29-1823 suggest that medical examinations are within the discretion of the trial judge, but the statute's legislative history also implies that at least some legislators intended the law to leave the judge with almost total discretion. During floor debate on section 29-1823, one senator[19] unsuccessfully sought to amend the bill to require the judge "to determine by competent medical authority" whether an accused was competent to stand trial.[20] Opponents of the amendment stressed that a judge often could decide whether a person was mentally competent without medical advice and should have such discretion.[21]

Although the Nebraska judge is not required to order a medical examination, he may do so. Should the judge believe a medical, psychiatric or psychological examination is warranted, he is confronted with a problem very similar to that facing the New York judge. The Nebraska judge must decide what role the medical opinion should play in determining the defendant's mental competence. Here again the New York law with its detailed definitions and procedures should be contrasted with the Nebraska trial judge's total discretion.

New York law requires the psychiatric examination to make "particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense."[22] Cooper criticizes this provision because it recognizes the psychiatrist as an expert on matters which are not exclusively medical.[23] Cooper notes that the psychiatrist might be an expert on whether the defendant is suffering from a mental illness or defect, but the psychiatrist should not determine whether a defendant understands the proceedings against him or can assist in his de-

(1971); State v. Saxon, 187 Neb. 338, 340, 190 N.W.2d 854, 856 (1971). The latter two cases were concerned with competency at the time of sentencing under § 29-1822 rather than competency to stand trial under § 29-1823.

18. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972).
19. Sen. Henry Pedersen of Omaha.
20. Floor Debate on L.B. 851, 77th Neb. Leg. Sess., May 8, 1967, 2069, 2071.
21. *Id.*
22. N.Y. CODE CRIM. PROC. § 730.10(9) (McKinney 1971).
23. *See* pp. 50-51 *infra.*

fense.[24] Cooper points out that such matters are more legal than medical and that the psychiatrist, who might not himself understand the legal proceedings or what makes a rational defense, usually is not capable of making the decision.[25] He stresses that requiring the psychiatrist to decide nonmedical issues is particularly unsatisfactory in New York because the statute tends, under certain circumstances, to make the psychiatrist the determining authority.[26] Under New York law if both psychiatrists agree that the accused is competent and the court, following a hearing, is not so satisfied, the judge must return the defendant for further psychiatric examination.[27] Thus, even if the New York judge understands that the psychiatric opinion should not be routinely accepted, the statute in these circumstances leans toward making the psychiatrists the determining authorities.

If a Nebraska judge chooses to order a medical examination of a defendant whose competency is in doubt, section 29-1823 does not require the medical report to state specific information. Nor does the statute suggest that the doctor should be the determining authority under any circumstances. Therefore, one might conclude that Cooper's concerns are not applicable to Nebraska. However, a closer examination of the competency law in practice shows that, although not required to do so by statute, Nebraska judges often ask medical experts whether the defendant can understand the proceedings against him and can assist in his defense. In *State v. Klatt*[28] the Nebraska Supreme Court discussed a psychiatric report made to a district court which included the doctors' opinions on these questions. The court noted that the doctors' report advised the lower court that the defendant understood the nature and object of the proceedings against him and was mentally competent to consult with and to aid counsel in a rational manner.[29] The supreme court did not question the value of the psychiatrists' opinions on these legal issues and seemed to recognize the reports as valid evidence that the defendant was competent to stand trial.[30] The court stated in *Klatt* that the test for determining mental competency to stand trial is whether the accused has capacity to understand the nature and object of the proceedings against him, to

24. *See* p. 56 *infra.*
25. *See* p. 51 *infra.*
26. *Id.*
27. N.Y. CODE CRIM. PROC. § 730.30(2) (McKinney 1971).
28. 187 Neb. 274, 188 N.W.2d 821 (1971).
29. *Id.* at 277, 188 N.W.2d at 823-24.
30. *Id.* at 280, 188 N.W.2d at 825. "In the absence of a showing of the invalidity of the psychiatrists' certificates, the court was required to proceed with the trial in the suspended criminal proceedings."

comprehend his own condition in reference to such proceedings and to make a rational defense.[31] Thus, the Nebraska judge, as well as the New York judge, often must decide how much authority to give to the medical experts' opinions on these matters which are more legal than medical.

It must be stressed, however, that it is not necessarily a mistake for a judge to ask a psychiatrist how a defendant's mental condition might affect his understanding of the proceedings or his ability to assist in his defense. The problem lies in permitting the judge to accept routinely the doctor's report on these matters as determinative of the issue. If the judge accepts the medical opinion as determinative, the judge is then allowing doctors, who probably are not qualified, to decide an issue which is more legal than medical. It might be argued that New York judges are more likely to treat the medical report as determinative than are Nebraska judges. This is possible because the New York statute requires a psychiatric examination and specifically provides that the medical report should cover important legal issues.[32] However, the Nebraska statute also leaves open the possibility that the judge will consider doctors' opinions as determinative, since the statute's brevity and indefiniteness concerning the weight to be given medical examinations tends to give the doctors' opinions a quality of authority. On the other hand, the New York law tends to give the psychiatrists a determining authority when the judge is required to order another medical examination if two psychiatrists disagree with the judge. Fortunately, the Nebraska competency statute has no provision which can give medical opinions this type of definite authority in determining legal issues.

In addition to problems similar to New York's, Nebraska's mental competency law has at least one major potential problem which is rooted in the language of Nebraska's older statute, section 29-1822. The major portion of this statute refers to a person's mental state after a guilty verdict and prior to sentencing.[33] It is also possible that its first sentence, which broadly states that a person "shall not be tried for the offense during the continuance of the lunacy or insanity,"[34] might be interpreted as applying to a person who becomes mentally incompetent during the trial. The more recent section 29-1823, as was noted earlier, applies only to a person who is mentally incompetent prior to trial. The major portion of section 29-1822 provides that "if, after the verdict of guilty, and be-

31. *Id.* at 279, 188 N.W.2d at 825.
32. N.Y. CODE CRIM. PROC. §§ 730.10(9), 730.30(1) (McKinney 1971).
33. NEB. REV. STAT. § 29-1822 (Reissue 1964).
34. *Id.*

fore judgment pronounced, such person becomes[35] lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue."[36] The statute's use of the words "lunatic or insane" and "lunacy or insanity" marks it as antiquated and confuses the issue of competency to be sentenced with legal responsibility.[37] By using the terms "lunacy or insanity," the statute implies that the relevant inquiries for identifying a person incompetent to be sentenced are the same as those used for determining legal responsibility or insanity at the time of the crime. The test of legal responsibility in Nebraska—capacity to know right from wrong—is not the same as the test which should determine competency to stand trial or to be sentenced.[38] The test for determining competency to stand trial is whether the defendant can understand the proceedings against him and assist in his defense.[39]

By confusing the mental competency and insanity issues, section 29-1822 can seriously mislead medical experts, lawyers and judges. Even without confusing, incorrect language such as that used in 29-1822, medical experts often do not understand the difference between mental competency and legal responsibility.[40] Many psychiatrists who are familiar with the test for legal responsibility will use the same test when judging a defendant's mental competency to stand trial or to be sentenced.[41]

Nebraska's statutory law should be revised to diminish the possibility that judges might consider medical opinions determinative

35. The word "becomes" in the context of this statute is another possible problem. In *Walker v. State*, 46 Neb. 25, 26, 64 N.W. 357 (1895), the court stated that Neb. Laws c. 42 § 454 (1873) applied only to defendants "who become lunatic or insane after the commission of the offense" and "a jury trial must already have been had before insanity supervened." This means that if a defendant's "insanity" begins prior to the end of the trial, § 29-1822 does not apply according to *Walker*. Therefore, if a defendant was "insane" prior to the trial, but such "insanity" was not discovered, in order to fall under § 29-1823, until after the trial and before sentencing, § 29-1822 also might not apply. *See* H. WEIHOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 432-34 (1954).
36. NEB. REV. STAT. § 29-1822 (Reissue 1964).
37. *See* A. MATTHEWS JR., MENTAL DISABILITY AND THE CRIMINAL LAW 20-21 (1970) [hereinafter cited as Matthews]; Eizenstat, *Mental Competency To Stand Trial*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 379, 388-90 (1969).
38. State v. Klatt, 187 Neb. 274, 279, 188 N.W.2d 821, 825 (1971).
39. *Id.*
40. *See* MATTHEWS, *supra* note 36, at 85; Slovenko, *Competency To Stand Trial: The Reality Behind the Fiction*, 8 WAKE FOREST L. REV. 1, 2-3 (1971).
41. *Id.* The possibility that a doctor will confuse the competency and insanity issues is another reason why judges must not routinely accept medical opinions on mental competency.

of the competency issue or confuse the issues of mental competency and legal responsibility. Section 29-1823 should be expanded to cover issues of mental incompetency arising during the trial, or after the verdict and prior to judgment. If section 29-1823 were expanded in this manner, there would be no reason to retain the older, confusing section 29-1822. Thus, section 29-1822, which uses the terms "lunacy or insanity" could be repealed.

As for the possibility that judges might consider medical opinions determinative of the issue, section 29-1823 already states that the judge "shall have the authority to determine whether or not the accused is competent to stand trial."[42] Such a statement should make it clear that the judge is the determining authority and the doctor's opinion is only one of many factors to consider. However, since doctors commonly are considered experts on a defendant's mental condition, the possibility exists that the judge also will consider them experts on the legal questions of whether the accused understands the proceedings and can assist in his defense. The Nebraska mental competency statute should clarify this problem by specifically stating that "any medical examination which may be ordered by the judge shall be only one factor in the judicial determination of the defendant's mental competency or incompetency." This provision might be somewhat redundant, but it would emphasize that in Nebraska the doctor's opinion is not determinative of the competency issues, which are more legal than medical.

Competency to stand trial or to be sentenced is a complex medico-legal issue. One problem involved with this issue is how much authority medical experts should have in determining whether a defendant is incompetent. Cooper criticizes the New York Criminal Procedure Law because it seems to recognize doctors as authorities on whether the accused can understand the proceedings against him and assist in his defense.[43] Cooper warns the New York judges that psychiatrists are not qualified to determine these legal questions.[44] Although Nebraska's competency law leaves more discretion with the judge, doctors in Nebraska also often are asked to report on these important legal questions. Thus, Nebraska judges also should be warned that medical experts are not qualified to determine whether a person is competent to stand trial. The medical expert may provide assistance, but the judge, not the doctor, must determine the mental competency issue.

Wayne Kreuscher '74

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42. NEB. REV. STAT. § 29-1823 (Cum. Supp. 1972).
43. *See* pp. 50-51 *infra.*
44. *See* p. 59 *infra.*