

1987 Assembly Bill 73

Date of enactment: November 19, 1987

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1987 Wisconsin Act 86

AN ACT to repeal 971.175; and to create 971.165 of the statutes, relating to criminal trials in which a person pleads not guilty by reason of mental disease or defect.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: In September 1979, the judicial council established the insanity defense committee to study the problems associated with the criminal trials of mentally ill persons and to recommend such changes in the statutes governing the subject as would improve the administration of justice.

The committee was chaired by Judge Gary B. Schlosstein and included the following members: Justice Shirley S. Abrahamson, Judge Thomas H. Barland, William M. Coffey, Francis R. Croak, Judge Edwin C. Dahlberg, Chief Judge John A. Decker, Prof. Walter J. Dickey, Robert D. Donohoo, Senator James T. Flynn, Frederick A. Fosdal, M.D., Jon Peter Genrich, Stephen M. Glynn, J. Douglas Haag, Prof. John J. Kircher, Albert A. Lorenz, M.D., Judge Daniel P. McDonald, Randall E. Morey, Rep. Mary Lou Munts, David C. Niblack and Leigh M. Roberts, M.D. The reporters for the committee were Frederick A. Fosdal, M.D., James L. Fullin, Jr. and Richard Malmgren.

The committee held 21 meetings between October 1979 and May 1981. Minutes of the final 13 meetings are available from the judicial council. The committee's recommendations, contained in 1981 Assembly Bill 765, were approved by the judicial council at its June 26, 1981, meeting.

The legislature enacted the provisions of 1981 Assembly Bill 765 governing mental competency to undergo criminal proceedings. The enactment became chapter 367, laws of 1981.

The present bill is based upon a portion of those provisions of 1981 Assembly Bill 765 which were not enacted. Detailed explanations are provided in the NOTES to the bill's sections.

SECTION 1. 971.165 of the statutes is created to read:

971.165 Trial of actions upon plea of not guilty by reason of mental disease or defect. (1) If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:

(a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

(b) If the plea of not guilty is tried to a jury, the jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. No verdict on the first plea may be valid or received unless agreed to by all jurors.

(c) If both pleas are tried to a jury, that jury shall be the same, except that:

1. If one or more jurors who participated in determining the first plea become unable to serve, the remaining jurors shall determine the 2nd plea.

2. If the jury is discharged prior to reaching a verdict on the 2nd plea, the defendant shall not solely on that account be entitled to a redetermination of the first plea and a different jury may be drawn to determine the 2nd plea only.

3. If an appellate court reverses a judgment as to the 2nd plea but not as to the first plea and remands for further proceedings, the 2nd plea may be determined by a different jury drawn for this purpose.

(d) If the defendant is found not guilty, the court shall enter a judgment of acquittal and discharge the defendant. If the defendant is found guilty, the court shall withhold entry of judgment pending determination of the 2nd plea.

(2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court. No verdict on the plea of not guilty by reason of mental disease or defect may be valid or received unless agreed to by at least five-sixths of the jurors.

(3) (a) If a defendant is not found not guilty by reason of mental disease or defect, the court shall enter a judgment of conviction and shall either impose or withhold sentence under s. 972.13 (2).

(b) If a defendant is found not guilty by reason of mental disease or defect, the court shall enter a judgment of not guilty by reason of mental disease or defect. The court shall thereupon proceed under s. 971.17. A judgment entered under this paragraph is interlocutory to the commitment order entered under s. 971.17 and reviewable upon appeal therefrom.

NOTE: Wisconsin presently requires each element of the crime (including any mental element) to be proven before evidence is taken on the plea of not guilty by reason of mental disease or defect. This statute provides for the procedural bifurcation of the pleas of not guilty and not guilty by reason of mental disease or defect, in order that evidence presented on the latter issue not prejudice determination of the former. *State ex rel. LaFollette v. Raskin*, 34 Wis. 2d 607 (1976).

The legal effect of a finding of not guilty by reason of mental disease or defect is that the court must commit the defendant to the custody of the department of health and social services under s. 971.17.

Subsection (1) (c) provides several necessary exceptions to the prior statute's requirement that the same jury try both pleas in order to avoid unnecessary redeterminations of guilt. *Kemp v. State*, 61 Wis. 2d 125 (1973).

Subsection (2) allows a five-sixths verdict on the plea of not guilty by reason of mental disease or defect.

SECTION 2. 971.175 of the statutes is repealed.

NOTE: This section has been replaced by new s. 971.165.
