§ 16-8-106. [Effective 1/1/2017] Examinations and report.

Colorado Statutes

Title 16. CRIMINAL PROCEEDINGS

CODE OF CRIMINAL PROCEDURE

Article 8. Insanity - Release

Part 1. GENERAL PROVISIONS

Current through Chapter 385 of the 2016 Legislative Sesion

§ 16-8-106. *[Effective 1/1/2017]* Examinations and report

(1) (a) All examinations ordered by the court in criminal cases shall be accomplished by the entry of an order of the court specifying the place where such examination is to be conducted and the period of time allocated for such examination. The defendant may be committed for such examination to the Colorado psychiatric hospital in Denver, the Colorado mental health institute at Pueblo, the place where he or she is in custody, or such other public institution designated by the court. In determining the place where such examination is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the examination require designation of a different facility. The defendant shall be observed and examined by one or more psychiatrists or forensic psychologists during such period as the court directs. For good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination as is advisable under the circumstances. Nothing in this section shall abridge the right of the defendant to procure an examination as provided in section 16-8-108 .

(b) An interview conducted in any case that includes a class 1 or class 2 felony charge or a felony sex offense charge described in section 18-3-402 , 18-3-404 , 18-3-405 , or 18-3-405.5 , C.R.S., pursuant to this section must be video and audio recorded and preserved. The court shall advise the defendant that any examination with a psychiatrist or forensic psychologist may be video and audio recorded. A copy of the recording must be provided to all parties and the court with the examination report. Any jail or other facility where the court orders the examination to take place must permit the recording to occur and must provide the space and equipment necessary for such recording. If space and equipment are not available, the sheriff or facility director shall attempt to coordinate a location and the availability of equipment with the court, which may consult with the district attorney and defense counsel for an agreed upon location. If no agreement is reached, and upon the request of either the defense counsel or district attorney, the court shall order the location of the examination which may include the Colorado mental health institute at Pueblo.

(c) (I) Prior to or during any examination required by this section, the psychiatrist or forensic psychologist shall assess whether the recording of the

examination is likely to cause or is causing mental or physical harm to the defendant or others or will make the examination not useful to the expert forensic opinion. If such a determination is made and documented contemporaneously in writing, the psychiatrist or forensic psychologist shall not record the examination or shall cease recording the examination, and the psychiatrist or forensic psychologist shall advise the court and the parties of this determination and the reasons therefore in a written report to the court. If only a partial recording is made, the psychiatrist or forensic psychologist shall provide the partial recording to the court and the parties, and the partial recording may be used by any psychiatrist or forensic psychologist in forming an opinion, submitting a report, or testifying on the issue of the defendant's mental health.

(II) If the examination is not recorded in whole or in part, the written report explaining the decision not to record the examination is admissible as evidence, and, at the request of either party, the court shall instruct the jury that failure to record the examination may be considered by the jury in determining the weight to afford the expert witness testimony.

(III) The psychiatrist or forensic psychologist does not need to record the administration of psychometric testing that involves the use of copyrighted material.

(d) The court shall determine the admissibility of any recording or partial recording, in whole or in part, subject to all available constitutional and evidentiary objections.

(2) (a) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists, forensic psychologists, and other personnel conducting the examination may be admissible in the defendant's trial on the issue of insanity or impaired mental condition and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) The defendant shall have a privilege against self-incrimination during the course of an examination under this section. The fact of the defendant's noncooperation with psychiatrists, forensic psychologists, and other personnel conducting the examination may be admissible in the defendant's trial on the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (b) shall apply to offenses committed on or after July 1, 1995, but prior to July 1, 1999.

(c) The defendant shall cooperate with psychiatrists, forensic psychologists, and other

personnel conducting any examination ordered by the court pursuant to this section. Statements made by the defendant in the course of such examination shall be protected as provided in section 16-8-107. If the defendant does not cooperate with psychiatrists, forensic psychologists, and other personnel conducting the examination, the court shall not allow the defendant to call any psychiatrist, forensic psychologist, or other expert witness to provide evidence at the defendant's trial concerning the defendant's mental condition including, but not limited to, providing evidence on the issue of insanity or at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. In addition, the fact of the defendant's noncooperation with psychiatrists, forensic psychologists, and other personnel conducting the examination may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to the defendant's mental condition including, but not limited to, the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (c) shall apply to offenses committed on or after July 1, 1999.

(3) (a) To aid in forming an opinion as to the mental condition of the defendant, it is permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists, forensic psychologists, and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists, forensic psychologists, or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity, eligibility for release, or impaired mental condition, and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.3-1302, C.R.S., the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (a) shall apply only to offenses committed before July 1, 1995.

(b) To aid in forming an opinion as to the mental condition of the defendant, it is

permissible in the course of an examination under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with psychiatrists, forensic psychologists, and other personnel conducting the examination, an opinion of the mental condition of the defendant may be rendered by such psychiatrists, forensic psychologists, or other personnel based upon such confessions, admissions, and any other evidence of the circumstances surrounding the commission of the offense, as well as the known medical and social history of the defendant, and such opinion may be admissible into evidence at trial and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. It shall also be permissible to conduct a narcoanalytic interview of the defendant with such drugs as are medically appropriate and to subject the defendant to polygraph examination. In any trial or hearing on the issue of the defendant's sanity or eligibility for release and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S., the physicians and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as the same entered into the formation of their opinions as to the mental condition of the defendant both at the time of the commission of the alleged offense and at the present time. This paragraph (b) shall apply to offenses committed on or after July 1, 1995.

(c) For offenses committed on or after July 1, 1999, when a defendant undergoes an examination pursuant to the provisions of paragraph (b) of this subsection (3) because the defendant has given notice pursuant to section 16-8-107(3) that he or she intends to introduce expert opinion evidence concerning his or her mental condition, the physicians, forensic psychologists, and other personnel conducting the examination may testify to the results of any such procedures and the statements and reactions of the defendant insofar as such statements and reactions entered into the formation of their opinions as to the mental condition of the defendant.

(4) A written report of the examination shall be prepared in triplicate and delivered to the clerk of the court which ordered it. The clerk shall furnish a copy of the report both to the prosecuting attorney and the counsel for the defendant.

(5) With respect to offenses committed before July 1, 1995, the report of examination shall include, but is not limited to:

(a) The name of each physician, forensic psychologist, or other expert who examined the defendant; and

(b) A description of the nature, content, extent, and results of the examination and any

tests conducted; and

(c) A diagnosis and prognosis of the defendant's physical and mental condition; and

(d) (I) An opinion as to whether the defendant suffers from a mental disease or defect; and, if so,

(II) Separate opinions as to whether the defendant was insane or had an impaired mental condition at the time of the commission of the act or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by the court.

(6) With respect to offenses committed on or after July 1, 1995, the report of examination shall include, but is not limited to, the items described in paragraphs (a) to (c) of subsection (5) of this section, and:

(a) An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that prevented the person from forming the culpable mental state that is an essential element of any crime charged; and, if so,

(b) Separate opinions as to whether the defendant was insane or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect or the condition of mind caused by mental disease or defect affects any mitigating factor. The nature of the opinions required depends upon the type of examination ordered by the court.

(7) With respect to offenses committed on or after July 1, 1999, when a defendant has undergone an examination pursuant to the provisions of this section because the defendant has given notice pursuant to section 16-8-107(3) that he or she intends to introduce expert opinion evidence concerning his or her mental condition, the report of examination shall include, but is not limited to, the items described in paragraphs (a) to (c) of subsection (5) of this section and:

(a) An opinion as to whether the defendant suffered from a mental disease or defect or from a condition of mind caused by mental disease or defect that affected the defendant's mental condition; and, if so,

(b) Separate opinions as to the defendant's mental condition including, but not limited to, whether the defendant was insane or is ineligible for release, as those terms are defined in this article, and, in any class 1 felony case, an opinion as to how the mental disease or defect or the condition of mind caused by mental disease or defect affects any mitigating factor. The nature of the opinions required depends

upon the type of examination ordered by the court.

Cite as C.R.S. § 16-8-106

History. Amended by 2016 Ch. 297, §1, eff. 1/1/2017.

Amended by 2013 Ch. 115, §4, eff. 8/7/2013.

L. 72: R&RE, p. 227, § 1. C.R.S. 1963: § 39-8-106. L. 73: p. 500, § 1. L. 83: (1), (2), (3), and (5)(e) amended, p. 674, § 4, effective July 1. L. 91: (1) amended, p. 1142, § 3, effective May 18. L. 95: (2), (3), and IP(5) amended and (6) added, p. 75, § 9, effective July 1. L. 98: (2), (3), (5)(d), and (6) amended, p. 382, § 3, effective April 21. L. 99: (2)(b) amended and (2)(c), (3)(c), and (7) added, pp. 401, 402, §§ 1, 2, 3, effective July 1. L. 2002: (2), (3)(a), and (3)(b) amended, p. 1492, § 137, effective October 1. L. 2002, 3rd Ex. Sess.: (2)(b), (2)(c), and (3)(b) amended, pp. 29, 30, §§ 19, 20, effective July 12. L. 2006: (1) amended, p. 177, § 1, effective March 31. L. 2008: (1), (2), (3), (5)(d)(II), (6)(b), and (7)(b) amended, p. 1851, § 6, effective July 1. L. 2013: (1), (2), (3), and (5)(a) amended, (SB13-116), ch. 115, p. 394, §4, effective August 7.

Note: *This section is set out twice. See also C.R.S. § 16-8-106 , effective until 1/1/2017.*

Case Notes:

ANNOTATION

Law reviews. For article, "The Mental State of Defendants in Criminal Trials -- A Comparison of Some Colorado and Massachusetts Procedures", see 14 Rocky Mt. L. Rev. 21 (1941). For note, "Trial Procedure in Colorado Under the 1951 Amendment Relating to Insanity in Criminal Cases", see 24 Rocky Mt. L. Rev. 223 (1952). For article, "Criminal Law", see 32 Dicta 409 (1955). For article, "One Year Review of Criminal Law and Procedure", see 38 Dicta 65 (1961). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For article, "Insanity and the Law", see 39 Dicta 325 (1962). For comment on French v. District Court, see 36 U. Colo. L. Rev. 280 (1964).

Annotator's note. Since § 16-8-106 is similar to repealed § 39-8-2 , C.R.S. 1963, § 39-8-2 , CRS 53, CSA, C. 48, § 508, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Subsection (2)(b) held constitutional. People v. Anderson, 70 P.3d 485 (Colo. App. 2002).

This section is not void for vagueness. The term "cooperate" in subsection (2)(c) is capable of a common meaning. People v. Bondurant, 2012 COA 50, 296 P.3d 200.

This section does not violate a defendant's constitutional privilege against self-incrimination. The information obtained in compulsory mental examinations is admissible only on the issue of mental condition. People v. Bondurant, 2012 COA 50, 296 P.3d 200.

Subsection (2)(c)'s preclusion of expert testimony concerning a defendant's mental condition by noncooperative defendants does not penalize defendants who invoke their privilege against self-incrimination because a court is not allowed to strike a noncooperative defendant's not guilty by reason of insanity plea or a defense of impaired mental condition or another mental condition. People v. Bondurant, 2012 COA 50, 296 P.3d 200.

This section does not violate a defendant's fundamental right to present a defense or the right to effective assistance of counsel. A defendant can present a defense if he or she complies with the statute. People v. Bondurant, 2012 COA 50, 296 P.3d 200.

Defendant has no constitutional right to counsel during a psychiatric examination. People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Court ordered competency examination is a critical stage of aggregate adversary proceedings. A criminal

defendant must be given the opportunity to consult with counsel prior to submitting to a court-ordered competency examination under this section. People v. Branch, 786 P.2d 441 (Colo. App. 1989).

This section does not deprive defendant of due process of law. One charged with a criminal offense, who claims he was insane at the time he committed the act with which he is charged, may be temporarily confined in a hospital for observation and examination without depriving him of due process of law. Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

Psychiatric examinations do not work a denial of due process or amount to self-incrimination; psychiatric interrogations cannot be likened to surreptitious extractions of evidence. Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed. 2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed. 2d 201 (1961).

Or compel him to testify against himself. Confinement of a defendant, who urges the defense of insanity, in a hospital for observation and examination does not offend against § 18 of art. II, Colo. Const., providing that no person shall be compelled to testify against himself in a criminal case. Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945).

An accused who submits to the procedures prescribed by statute in connection with criminal insanity cannot at the same time claim that he is being compelled to testify against himself. Such incarceration and examination does not offend against § 18 of art. II, Colo. Const. Castro v. People, 140 Colo. 493, 346 P.2d 1020 (1959).

The general assembly, in providing for the admission in evidence of defendant's statements to the psychiatrist where sanity is the issue, but barring them on the guilt issue, does not violate the defendant's rights against self-incrimination. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

When the sanity issue is a separate proceeding, as it is in Colorado, before a jury that cannot consider the issue of guilt in the event the defendant is found sane and where the admissions cannot be used to establish guilt, there is no self-incrimination within the contemplation of the constitutional provisions. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

In a sanity trial, the admission of statements made by the defendant does not violate his right against self-incrimination because the issue of defendant's guilt is not decided. People v. Osborn, 42 Colo. App. 376, 599 P.2d 937 (1979).

Use of defendant's statements to hospital employee while confined for sanity examination to rebut defendant's self-defense theory did not constitute reversible error as defendant failed to properly object to hospital employee's testimony at trial and fact that testimony was given in prosecution's case-in-chief rather than as rebuttal testimony did not constitute plain error which would require consideration of issue not raised at trial. People v. Kruse, 839 P.2d 1 (Colo. 1992).

Nor does prearraignment examination. Prearraignment examinations do not operate per se to deny defendant due process of law or compel self-incrimination. Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed. 2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed. 2d 201 (1961).

Defendant's statutory privilege against self-incrimination during course of court-ordered psychiatric examinations and protection from being confronted with evidence acquired from examinations did not extend to proceedings conducted for sentencing purposes. And, even if the constitutional privilege against self-incrimination is assumed to apply to the use of information for sentencing purposes after guilt has been established, the defendant waived his right against self-incrimination where he consented to use of reports from court-ordered psychiatric examination at sentencing hearing and had been apprised of his constitutional rights by his attorney. People v. Hernandez, 768 P.2d

755 (Colo. App. 1988).

Requiring a defendant to cooperate during a sanity examination does not subject him or her to an unconstitutional risk of self-incrimination, nor is cooperation a prerequisite to asserting a mental condition defense. Hence, a defendant is not forced to choose between constitutional rights. People v. Herrera, 87 P.3d 240 (Colo. App. 2003).

A psychiatrist does not violate a defendant's constitutional privilege against self-incrimination by continuing to pursue questions germane in reaching an opinion regarding sanity after such defendant has expressed reluctance in discussing certain topics. People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Trial may not precede commitment. Where one accused of a felony enters pleas of "not guilty" and "not guilty by reason of insanity", it is not permissible to try defendant on the issues raised by his not guilty plea prior to any commitment for observation and examination as required by this section. Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954).

The procedure outlined in this section is not exclusive where an accused enters a plea of not guilty by reason of insanity. Jones v. People, 146 Colo. 40, 360 P.2d 686 (1961).

This section does not establish exclusive procedures governing the mental examination of the accused. Though mandatory to some extent, this section does not govern all aspects of the criminal insanity question. Early v. People, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

As exclusive procedures interfere with right to adduce evidence. A statute which creates exclusive procedures for examining the accused and for the giving of expert testimony interferes with the constitutional right of the parties to adduce such evidence as they think useful. Early v. People, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

Thus, this section does not exclude other examinations or testimony based upon nonstatutory examinations. Early v. People, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

This section, while intended to insure examination of accused persons by psychiatrists and specialists in mental diseases, does not operate to exclude employment of psychiatrists by either the state or the accused, or the admission of their testimony on the trial of the issue of insanity. Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed. 2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed. 2d 201 (1961).

The testimony of psychiatrists based on prearraignment examinations was correctly admitted in evidence along with the testimony of several other psychologists and psychiatrists testifying for the state and the defense. Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed. 2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed. 2d 201 (1961).

Or private employment of psychiatrists. This section and § 16-8-103 do not operate to exclude private employment of psychiatrists. Early v. People, 142 Colo. 462, 352 P.2d 112, cert. denied, 364 U.S. 847, 81 S. Ct. 90, 5 L. Ed. 2d 70 (1960).

Substitution of court-appointed psychiatrist by ex parte order. Defendant suffered no prejudice where hearing on substitution allowed him ample opportunity to present evidence refuting the "good cause" shown for the substitution of experts. People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), cert. granted, 783 P.2d 838 (Colo. 1989), cert. denied, 805 P.2d 1116 (Colo. 1991).

Although a defendant is entitled to an examination by an expert of his or her choosing, the state is not

obligated to pay for such expert. People v. Palmer, 31 P.3d 863 (Colo. 2001).

Indigent defendants are entitled to expert examinations at the state's expense, but that does not mean the state must pay for the expert of defendant's choosing. People v. Palmer, 31 P.3d 863 (Colo. 2001).

Defendant not entitled to examination conducted by doctor of his choice. A defendant is not entitled, as a matter of due process, to a second psychiatric examination conducted by the doctor of his own choosing. People v. Mascarenas, 643 P.2d 786 (Colo. App. 1981); People v. Palmer, 31 P.3d 863 (Colo. 2001); Bloom v. People, 185 P.3d 797 (Colo. 2008).

Moreover, a paying defendant wishing to exercise his right to a second competency evaluation by an expert of his own choosing must nonetheless make a showing of good cause under this section. People v. Palmer, 31 P.3d 863 (Colo. 2001); Bloom v. People, 185 P.3d 797 (Colo. 2008).

Court may require good cause to be shown before ordering further psychiatric examination once defendant has been examined by specialists in field of nervous and mental diseases. Massey v. District Court, 180 Colo. 359, 506 P.2d 128 (1973).

Court may determine good cause has been shown adequate to order additional examination on the issue of sanity if prior experts' opinions were incomplete and a potentially new and significant diagnosis had been proposed that could dramatically affect the outcome of the assessment of defendant's behavior. People v. Grant, 174 P.3d 798 (Colo. App. 2007).

The presumption is that the professional conclusions of the mental health experts are fair and impartial. The federal circuit court cannot impute to the psychiatrists a predetermined diagnosis of the accused where the examinations were conducted without any coercive influence whatsoever, and, according to the defendant, the statements made to the psychiatrists were no more than repetition of voluntary statements made the night before. Early v. Tinsley, 286 F.2d 1 (10th Cir. 1960), cert. denied, 365 U.S. 830, 81 S. Ct. 717, 5 L. Ed. 2d 708, reh'g denied, 365 U.S. 890, 81 S. Ct. 1033, 6 L. Ed. 2d 201 (1961).

There is no statutory or regulatory requirement that a court-appointed expert in a competency evaluation be "neutral and detached". People v. Karpierz, 165 P.3d 753 (Colo. App. 2006).

Subsection (3) contains a specific exception to the hearsay rule. People v. Lyles, 186 Colo. 302, 526 P.2d 1332 (1974).

And is limited to sanity hearings or trials. The general assembly in subsection (3) limited the use of "confessions and admissions" and "statements and reactions" to trials or hearings where the issue of defendant's sanity is the issue. This prohibits its use as evidence by the people in a trial on the issue of guilt. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

The use of the confessions or admissions of the defendant in the decisional process by the psychiatrist in forming an opinion as to the sanity or insanity of the defendant does not aid in the proof of guilt, but it is perforce limited to the issue of sanity. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

This section does not direct or authorize a defendant's treatment at the psychopathic hospital, nor does it contemplate a trial of the defendant by the hospital staff; it provides merely for the observation and examination of the defendant while at the hospital. Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931).

It contemplates observation as well as examination. The legislative scheme for determining a defendant's mental condition at the time of the alleged offense contemplates observation as well as examination. Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970); People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).

And results of both processes are admissible. What the psychiatrist learns from either observation or examination

or from both processes, to the extent that such learning contributes to his opinion, is relevant and admissible in evidence. Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970); People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).

Admissions to privately retained psychiatrist privileged. The prosecution may not call, as a witness in its case-in-chief, a psychiatrist privately retained by the defendant in connection with an insanity plea and elicit from the psychiatrist incriminating admissions made by the defendant during a sanity examination. People v. Rosenthal, 617 P.2d 551 (Colo. 1980).

But copy of report to prosecution if defense to offer testimony of exam. The only limitation placed on a defendant seeking a sanity examination by a private psychiatrist is that a copy of the psychiatrist's report be furnished to the prosecution reasonably in advance of the sanity trial if the defense intends to offer testimony about the examination. People v. Rosenthal, 617 P.2d 551 (Colo. 1980).

Nowhere is it indicated that "examination" as used in this section is restricted merely to "tests", but, on the contrary, it is broadened to include conversations and other vital evidence from the defendant, as well as "procedures" and "observation". People v. Lyles, 186 Colo. 302, 526 P.2d 1332 (1974).

An assessment that ignores or cannot be tested against a defendant's prior mental health history has marginal utility. People v. Herrera, 87 P.3d 240 (Colo. App. 2003).

Refusal to cooperate with examiners does not forfeit defense. A person accused of a crime, who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for refusal to "cooperate" with persons appointed to examine him. Section 16-8-105 and this section, which prescribe the procedures to be followed upon the entry of a plea of not guilty by reason of insanity, cannot operate to destroy the constitutional safeguards against self-incrimination. French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963).

But defendant's noncooperation may be shown. If the defendant chooses to remain silent when the state's psychiatrist attempts his examination, the fact of his noncooperation may be shown to the jury. Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970).

It is permissible to use defendant's silence at a sanity examination as evidence of his or her sanity, especially where the defendant was specifically informed that, if he refused to cooperate with the examining physician, such noncooperation could be referred to at his trial and where the jurors were instructed that they could consider defendant's refusal to speak with the examining psychiatrist only in considering defendant's mental state and for no other purpose. People v. Tally, 7 P.3d 172 (Colo. App. 1999).

And the expert witness may testify to any conclusions as to mental condition he is able to draw from the conduct or actions of the defendant or from what he says during such an interview. Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970).

The defendant has a constitutional right not to talk to the psychiatrist, but he cannot complain, if the doctor is able to draw inferences from his conduct upon which to found an opinion as to his sanity or lack of it. Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970); People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).

A psychologist may testify in court to defendant's statements and reactions, if they help him form his professional opinion. People v. Lyles, 186 Colo. 302, 526 P.2d 1332 (1974).

Such testimony does not violate the defendant's privilege against self-incrimination, either at the sanity trial or the guilt trial. People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).

The jury may return verdict finding defendant sane when no evidence is presented to rebut the presumption of

sanity, and defendant refuses to talk with the court-appointed psychiatrist. People v. Johnson, 180 Colo. 177, 503 P.2d 1019 (1972).

Section does not entitle defendant's psychiatrist to copy of confession. This section is inapplicable to demand of defendant that a copy of his confession in the possession of the district attorney be turned over to defendant's psychiatrist witness. Wooley v. People, 148 Colo. 392, 367 P.2d 903 (1961).

But prosecutor entitled to examining physician's information. Where the confessions and admissions of the defendant have been weighed by the examining physician in evaluating the defendant's sanity, fairness requires that the prosecutor have the same information as the defense attorney. Lewis v. Thulemeyer, 189 Colo. 139, 538 P.2d 441 (1975).

Reversal is justified only when substantive right has been prejudiced. In order to justify a reversal on the ground that the hospital staff acted beyond the powers conferred by this section, it must appear that in this case some substantial right of the defendant has been prejudiced, and that depends upon the use made of the information so obtained. Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931).

Trial court erred in ordering a second evaluation. A court may order a second evaluation only for good cause shown. There must be some basis, other than counsel's opinion, for showing that the first examination was inadequate or unfair. People v. Garcia, 87 P.3d 159 (Colo. App. 2003), aff'd in part and rev'd in part on other grounds, 113 P.3d 775 (Colo. 2005).

Learning disability such as a disorder of written expression is outside of the statutory definition of "insanity". Therefore, evidence of defendant's learning disability to prove a mistake of fact is admissible without an insanity plea as long as defendant provides notice and permits a court-ordered examination. The place and time period for the examination is at the trial court's discretion. People v. Wilburn, 2012 CO 21, 272 P.3d 1078.

Applied in People v. Pearson, 190 Colo. 313, 546 P.2d 1259 (1976); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Roark, 643 P.2d 756 (Colo. 1982).

Cross References:

For the legislative declaration contained in the 2002 act amending subsections (2), (3)(a), and (3)(b), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration contained in the 2002 act amending subsections (2)(b), (2)(c), and (3)(b), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2008 act amending subsections (1), (2), (3), (5)(d)(II), (6)(b), and (7)(b), see section 1 of chapter 389, Session Laws of Colorado 2008.