CHAPTER 973

SENTENCING

973.01 Indeterminate sentence; Wisconsin state prisons. (1) (a) If imprisonment in the Wisconsin state prisons for a term of years is imposed, the court may fix a term less than the prescribed maximum. The form of such sentence shall be substantially as follows: "You are hereby sentenced to the Wisconsin state prisons for an indeterminate term of not more than ..... (the maximum as fixed by the court) years".

(b) The sentence shall have the effect of a sentence at hard labor for the maximum term fixed by the court, subject to the power of actual release from confinement by parole by the department or by pardon as provided by law. If a person is sentenced for a definite time for an offense for which he may be sentenced under this section, he is in legal effect sentenced as required by this section, said definite time being the maximum period. A defendant convicted of a crime for which the minimum penalty is life shall be sentenced for life.

(2) Upon the recommendation of the department, the governor may, without the procedure required by ch. 57, discharge absolutely, or upon such conditions and restrictions and under such limitation as he thinks proper, any inmate committed to the Wisconsin state prisons after he has served the minimum term of punishment prescribed by law for the offense for which he was sentenced, except that if the term was life imprisonment, 5 years must elapse after parole before such a recommendation can be made to the governor. Such discharge shall have the effect of an absolute or conditional pardon, respectively.

(3) Female persons convicted of a felony may be committed to the Taycheedah correctional institution.

History: 1973 c. 90; 1975 c. 189 s. 99 (1); 1975 c. 224 s. 146m.

The supreme court adopts Standard 2.3 (c) of the ABA Standards Relating to Appellate Review of Sentences, thereby requiring the sentencing judge to state for the record in the presence of the defendant the reasons for selecting the particular sentence imposed or, if the sentencing judge deems it in the interest of the defendant not to state his reasons in the presence of the defendant, to prepare a statement for transmission to the reviewing court as part of the record. McCleary v. State, 49 W (2d) 263, 182 NW (2d) 512.

It is not a denial of equal treatment to sentence a defendant to 4 years imprisonment although other persons involved (all minors) received lesser or no punishment. State v. Schilz, 50 W (2d) 395, 184 NW (2d) 134.

An abuse of discretion, as it relates to sentencing procedures, will be found only where there is no rational basis for the imposition of the sentence or these rationale are not articulated in, or inferable from, the record, or where discretion is exercised on the basis of clearly irrelevant or improper factors. Davis v. State, 52 W (2d) 697, 190 NW (2d) 890.

It is not an abuse of discretion to sentence a mature man to 7 years in prison for a sex offense against a 5 year old boy. Bastian v. State, 54 W (2d) 240, 194 NW (2d) 687.

Proper factors to be considered in determining a sentence listed. Time spent in jail before sentencing is not necessarily required to be deducted from the sentence. State v. Tew, 54 W (2d) 361, 195 NW (2d) 615.

Trial court increase of the defendant's sentence based solely on "reflection", did not constitute a valid basis for modification of a sentence, because this was not a "new factor" justifying a more severe sentence, a prerequisite for sentence reevaluation. Scott v. State, 64 W (2d) 54, 218 NW (2d) 350.

The trial court must take into consideration the time the defendant has spent in preconviction custody. Such consideration must be given even though the time spent in custody when added to the sentence would be less than the maximum. State v. Tew, 54 W (2d) 361, modified by making such consideration mandatory rather than permissive. Byrd v. State, 65 W (2d) 415, 222 NW (2d) 696.

Where the preconviction time in jail added to the sentence imposed does not reach the maximum possible under the statute, the rule in Byrd and the credit it gives is inapplicable. State v. Seals, 65 W (2d) 434, 223 NW (2d) 158.

Defendant's contention that he is being punished 3 times for carrying a weapon on the night in question is erroneous. He was convicted and sentenced for 3 acts. Ruff v. State, 65 W (2d) 713, 223 NW (2d) 446.

Sentence of the maximum 5 years in prison is reduced to reflect 89 days of a total 118 days of pretrial incarceration during which time defendant was unable to raise bail because of indigency. Wilkins v. State, 66 W (2d) 628, 225 NW (2d) 492.

A defendant's change in attitude or rehabilitative progress subsequent to sentencing is a factor to be considered by the department of health and social services in determining parole but is not a proper consideration upon which a trial court might base a reduction of sentence. State v. Wuensch, 69 W (2d) 467, 230 NW (2d) 665.

The rule of Byrd (65 W (2d) 415) is not applicable to confinement during nonworking hours imposed subsequent to conviction as a condition of a probation which

is later revoked. State v. Wills, 69 W (2d) 489, 230 NW (2d) 827.

The trial court's modification and making concurrent of certain of defendant's sentences for burglary was proper on the basis that subsequent to imposition of sentence the supreme court determined in Edelman v. State (62 W (2d) 613) that a prison sentence has a minimum parole eligibility of one-year, because at the original sentencing hearing, the state emphasized eligibility for "instant parole" as a reason for the imposition of a substantial sentence on the first count and consecutive sentences on the other counts. Kutchera v. State, 69 W (2d) 534, 230 NW (2d) 750.

A trial court may take into account any charges pending against defendant in determining sentence, because such charges constitute evidence of a pattern of behavior which is an index as to defendant's character, a critical sentencing factor. Repeated adjournments place an unwarranted additional weight upon the state's already overburdened trial courts, and delaying tactics by a defendant may be considered as a factor in sentencing. Brozovich v. State, 69 W (2d) 653, 230 NW (2d) 639.

See note to 973.15, citing Guyton v. State, 69 W (2d) 663, 230 NW (2d) 726.

A defendant financially unable to make bail who is convicted of multiple offenses and given the statutory maximum for each offense, with sentences imposed to run concurrently, must be credited with his presentence incarceration as having received the maximum allowable sentence, since each sentence is considered separately, and the fact that the trial court chose to impose the sentences concurrently rather than consecutively does not alter the fact that each sentence was the maximum provided by law. Mitchell v. State, 69 W (2d) 695, 230 NW (2d) 884.

Although evidence concerning the incidents of sexual activity abroad was relevant as to defendant's character and thus admissible at the sentencing hearing, the trial court abused its discretion by punishing defendant not only for the crime of which he stood convicted, but for the events which occurred outside Wisconsin, as indicated by the fact that both sentencing hearings were devoted largely to these foreign incidents. Rosado v. State, 70 W (2d) 280, 234 NW (2d) 69.

973.015 Misdemeanors, special disposition. (1) When a person under the age of 21 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum penalty is imprisonment for one year or less in the county jail, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

(2) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, such probation has not been revoked. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record.

History: 1975 c. 39; 1975 c. 189 s. 105; 1975 c. 199.

Note: Chapter 189, laws of 1975, s. 105, provides that this section is created effective July 1, 1976.

973.02 Place of imprisonment when none expressed. When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, 1) a sentence of less than one year shall be to the county jail, 2) a sentence of more than one year shall be to the Wisconsin state prisons and the minimum under the indeterminate sentence law shall be one year, and 3) a sentence of one year may be to either the Wisconsin state prisons or the county jail. But in any proper case sentence and commitment may nevertheless be to the department or any house of correction or other institution as provided by law.

History: 1973 c. 90.

973.03 Jail sentence. (1) If at the time of passing sentence upon a defendant who is to be imprisoned in a county jail, there is no jail in the county suitable for said defendant, the court may sentence him to any suitable county jail in the state. The expenses of supporting him there shall be borne by the county in which the crime was committed.

(2) A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons.

History: 1971 c. 298.

973.04 Credit for imprisonment under earlier sentence for the same crime. When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement theretofore served and good time, if any, earned by the defendant pursuant to ss. 53.11 and 53.12 while so confined.

973.05 Fines. (1) When a defendant is sentenced to pay a fine, the court may grant permission for the payment to be made within a period not to exceed 60 days. If no such permission is embodied in the sentence, the fine shall be payable forthwith.

(2) When a defendant is sentenced to pay a fine and is also placed on probation, the court may make the payment of the fine a condition of probation.

See note to art. I, sec. 8, citing State ex rel. Pedersen v. Blessinger, 56 W (2d) 286, 201 NW (2d) 778.

973.06 Costs. (1) The costs taxable against the defendant shall consist of the following items and no others:

(a) The necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, preliminary examination and trial of the defendant, including, in the discretion of the court, the fees and disbursements of the agent appointed to return a defendant from another state or country.

(b) Fees and travel allowance of witnesses for the state at the preliminary examination and the trial.

(c) Fees and disbursements allowed by the court to expert witnesses. Section 814.04 (2) shall not apply in criminal cases.

(d) Fees and travel allowance of witnesses for the defense incurred by the county at the request of the defendant, at the preliminary hearing and the trial.

(e) Attorney fees payable to the defense attorney by the county.

(2) The court may remit the taxable costs, in whole or in part.

History: Sup. Ct. order, 67 W (2d) 783.

Right to counsel; repayment of cost of court-appointed counsel as a condition of probation. 56 MLR 551.

973.07 Failure to pay fine or costs. When a fine or the costs are not paid as required by the sentence, the defendant may be committed to the county jail until the fine and costs are paid or discharged for a period fixed by the court not to exceed 6 months.

See note to art. I, sec. 8, citing State ex rel. Pedersen v Blessinger, 56 W (2d) 286, 201 NW (2d) 778.

973.08 Records accompanying prisoner. When any defendant is sentenced to the Wisconsin state prisons, a copy of the judgment of conviction shall be delivered by the officer executing the judgment to the warden or superintendent of the institution when the prisoner is delivered. The transcript of the testimony and proceedings shall be filed pursuant to s. 256.57 (2) within 120 days from the date sentence is imposed unless the period is extended by the court.

History: 1971 c. 298 s. 26 (1).

973.09 Probation. (1) When a person is convicted of a crime, the court may, by order, withhold sentence or impose sentence and stay its execution, and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

(2) The original term of probation shall be:

(a) For misdemeanors, not less than 6 months, nor more than 2 years;

(b) For felonies, not less than one year nor more than either the statutory maximum term of imprisonment for the crime or 3 years, whichever is greater.

(3) Prior to the expiration of any probation period, the court may for cause by order extend probation for a stated period or modify the terms and conditions thereof.

(4) The court may also require as a condition of probation that the probationer be confined in the county jail between the hours or periods of his employment during such portion of his term of probation as the court specifies, but not to exceed one year and the court shall require him to pay the costs as provided in s. 56.08 (4). While confined pursuant to this subsection he shall be subject to all the rules of the jail and the discipline of the sheriff.

(5) When the probationer has satisfied the conditions of his probation, he shall be discharged and the department shall issue him a certificate of final discharge, a copy of which shall be filed with the clerk.

History: 1971 c. 298.

See note to 343.44, citing State v. Duffy, 54 W (2d) 61, 194 NW (2d) 624.

ABA Standard 1.3 adopted as to the criteria for granting probation. Bastian v. State, 54 W (2d) 240, 194 NW (2d) 687.

See note to art. I, sec. 8, citing State v. Gerard, 57 W (2d) 611, 205 NW (2d) 374.

Subsequent to conviction for escape of a defendant previously convicted of burglary and placed on probation with condition of incarceration pursuant to (4), the trial court did not abuse its discretion in granting a new trial in the interest of justice, since defendant's temporary absconding occurred during a release period, and he therefore was not in custody within the meaning of 946.42 (5) (b). State v. Schaller, 70 W (2d) 107, 233 NW (2d) 416.

973.10 Control and supervision of probationers. (1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.

(2) If a probationer violates the conditions of his probation, the department may order him brought before the court for sentence which shall then be imposed without further stay or if he has already been sentenced, may order him to prison; and the term of the sentence shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison. The officer shall execute such order as a warrant for arrest but any officer may, without order or warrant, take the probationer into custody whenever necessary in order to prevent escape or enforce discipline or for violation of probation.

History: 1971 c. 298; 1975 c. 41, 157, 199.

Defendant cannot claim that his probation was not validly revoked for escaping from county jail while awaiting trial on another offense because he was subsequently acquitted of that offense. Motions for reconsideration of probation revocation orders must be made within 90 days. Dobs v. State, 47 W (2d) 20, 176 NW (2d) 289.

Before probation can be revoked the department must hold a hearing and make a record so that on judicial review it can be determined whether the department acted

arbitrarily or capriciously. The hearing need not be formal. State ex rel. Johnson v. Cady, 50 W (2d) 540, 185 NW (2d) 306.

Revocation of probation is an integral part of the sentencing process; hence a defendant is entitled to assistance of counsel at parole or probation revocation hearings without regard to whether the hearing occurs in a sentence withheld or a postsentence situation. Oestrich v. State, 55 W (2d) 222, 198 NW (2d) 664.

Since probation revocation hearings are independent from the original conviction and sentencing, a judge disqualified in the original case may preside at the hearing in the absence of challenge. State v. Fuller, 57 W (2d) 408, 204 NW (2d) 452.

Witnesses at a probation revocation hearing need not be sworn. State v. Gerard, 57 W (2d) 611, 205 NW (2d) 374.

ABA Standards Relating to Probation adopted and applied. State ex rel. Plotkin v. H&SS Dept. 63 W (2d) 535, 217 NW (2d) 641.

See note to 57.06, citing State ex rel. Hanson v. H&SS Dept. 64 W (2d) 367, 219 NW (2d) 267.

While the U.S. Supreme Court in Scarpelli has explicated that the rights of a defendant to counsel could arise at both the preliminary and final hearing, discretion is specifically lodged in the state authority charged with responsibility for administering. State ex rel. Hawkins v. Gagnon, 64 W (2d) 394, 219 NW (2d) 252.

See note to 257.23, citing State ex rel. Fitas v. Milw. County, 65 W (2d) 130, 221 NW (2d) 902, concerning counsel on revocation.

The imposition of sentence subsequent to revocation of probation is governed by (2) rather than the general sentencing statute, 973.15 (1), and under (2), a trial court may not impose the sentence consecutive to that imposed on a conviction arising between imposition and revocation of the probation, because the statute requires that the sentence imposed upon revocation of probation "shall begin on the date he enters the prison." Drinkwater v. State, 69 W (2d) 60, 230 NW (2d) 126.

A defendant convicted of taking indecent liberties with a minor and sexual perversion, placed on probation, allowed to settle in Tennessee, and charged with an attempted sodomy violation of probation there was denied due process where the revocation hearing was held in Wisconsin and the H&SS department refused to allow deposition of his witnesses in Tennessee, because the witnesses' testimony as to defendant's actions on the date of the alleged assault constituted testimony of a direct and unequivocally exculpatory nature rather than merely cumulative, character, or background testimony which might have been adequately presented by deposition or affidavit. State ex rel. Harris v. Schmidt, 69 W (2d) 668, 230 NW (2d) 890.

See note to art. I, sec. 8, citing Hahn v. Burke, 430 F (2d) 100.

A probation revocation hearing may be administrative. Retained or appointed counsel must be allowed to participate. Gunsolus v. Gagnon, 454 F (2d) 416.

Probation revocation; right to a hearing and to counsel. 1971 WLR 648.

973.12 Sentence of a repeater. (1) Whenever a person charged with a crime will be a repeater as defined in s. 939.62 if convicted, any prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. The court may, upon motion of the district attorney, grant a reasonable time to investigate possible prior convictions before accepting a plea. If such prior convictions are admitted by the defendant or proved by the state, he shall be subject to sentence under s. 939.62 unless he establishes that he was pardoned on grounds of innocence for any crime necessary to constitute him a repeater. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported. Any sentence so reported shall be deemed prima facie to have been fully served in actual confinement or to have been served for such period of time as is shown or is consistent with the report. The court shall take judicial notice of the statutes of the United States and foreign states in determining whether the prior conviction was for a felony or a misdemeanor.

(2) In every case of sentence under s. 939.62, the sentence shall be imposed for the present conviction, but if the court indicates in passing sentence how much thereof is imposed because the defendant is a repeater, it shall not constitute reversible error, but the combined terms shall be construed as a single sentence for the present conviction.

973.13 Excessive sentence, errors cured. In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

973.14 Sentence to house of correction. (1) In addition to the authority in ss. 53.18 and 56.18, prisoners sentenced to a county jail may be transferred by the sheriff to the house of correction without court approval except that prisoners to whom the privileges of s. 56.08 have been granted may not be transferred without court approval.

(2) Prisoners confined in the house of correction may be transferred by the superintendent of the house of correction to the county jail without court approval.

(3) A prisoner sentenced to a county jail or the house of correction being held in a county jail awaiting trial on another charge shall be deemed to be serving such county jail or house of correction sentence and shall be given credit on such sentence as provided in s. 53.43 or 56.19.

973.15 Sentence, terms, escapes. (1) All sentences to the Wisconsin state prisons shall be for one year or more. Except as otherwise provided in this section, all sentences commence at noon on the day of sentence, but time which elapses after sentence while the defendant is in the county jail or is at large on bail shall not be computed as any part of his term of imprisonment. The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent or that it shall commence at the expiration of any other sentence; and if the defendant is then serving a

sentence, the present sentence may provide that it shall commence at the expiration of the previous sentence. If a convict escapes, the time during which he is unlawfully absent from the prison after such escape shall not be computed as part of his term. Courts may impose sentences to be served in whole or in part concurrently with a sentence being served in a federal institution or an institution of another state.

(2) When a court orders a sentence to the Wisconsin state prisons to be served in whole or in part concurrently with a sentence being served in a federal institution or an institution of another state, the trial and commitment records required under s. 973.08 shall be delivered immediately to the warden or superintendent of the Wisconsin institution designated as the reception center to receive the prisoner when he becomes available to Wisconsin authorities.

(3) Sections 53.11 and 57.06 are applicable to an inmate serving a sentence to the Wisconsin state prisons but confined in a federal institution or an institution in another state. Section 53.12 applies only during that portion of the sentence served in actual residence in a Wisconsin institution.

History: 1973 c. 90.

Where an offender commits a crime while on parole and is sentenced therefor prior to his return to the state prison, the sentence determined may not be imposed consecutive to the earlier sentence from which he was paroled because: (1) Under (1), a consecutive sentence may be imposed to commence at the expiration of a sentence the defendant is "then serving," and (2) under 57.072 the earlier sentence does not recommence until the offender is returned to the institution; hence, he is not "then serving" when the subsequent sentence is imposed Guyton v. State, 69 W (2d) 663, 230 NW (2d) 726.

Prisoner was entitled to credit toward his credit for the good time he would have earned with respect to presentence time served as a result of his inability to make bail. Monsour v. Gray, 375 F Supp. 786.

State prisoner was entitled to credit for period of preconviction detention from date of arrest to date of trial which resulted from financial inability to meet the bond. Taylor v. Gray, 375 F Supp. 790.

973.16 Time out. If an order or judgment releasing a prisoner on habeas corpus is reversed, the time during which he was at liberty thereunder shall not be counted as part of his term.

973.17 Judgment against a corporation. (1) If a corporation fails to appear within the time required by the summons, the default of such corporation may be recorded and the charge against it taken as true, and judgment shall be rendered accordingly.

(2) Upon default of the defendant corporation or upon conviction, judgment for the amount of the fine shall be entered.

(3) A judgment against a corporation shall be collected in the same manner as in civil actions.