CHAPTER 970

CRIMINAL PROCEDURE — PRELIMINARY PROCEEDINGS

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Cross−reference: See definitions in s. 967.02.

970.01 Initial appearance before a judge. (1) Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed. The initial appearance may be conducted on the record by telephone or live audiovisual means under s. 967.08. If the initial appearance is conducted by telephone or live audiovisual means, the person may waive physical appearance. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction. If the person does not waive physical appearance, conducting the initial appearance by telephone or live audiovisual means under s. 967.08 does not waive any grounds that the person has for challenging the court's personal jurisdiction.

(2) When a person is arrested without a warrant and brought before a judge, a complaint shall be filed forthwith.

History: Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 403; 1995 a. 27.

Judicial Council Note, 1988: Sub. (1) is amended to authorize the arrested person to waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audio−visual means. [Re Order effective Jan. 1, 1988]

The interval between an arrest and an initial appearance is never unreasonable when the arrested suspect is already in the lawful physical custody of the state. State v. Harris, 174 Wis. 2d 367, 497 N.W.2d 742 (Ct. App. 1993).

The rule that a judicial determination of probable cause must be made within 48 hours of a warrantless arrest applies to Wisconsin; failure to comply did not require suppression of evidence not obtained because of the delay when probable cause for arrest was present. State v. Koch, 175 Wis. 2d 684, 499 N.W.2d 153 (1993).

Failure to conduct a probable cause hearing within 48 hours of arrest is not a jurisdictional defect and not grounds for dismissal with prejudice or voiding of a subsequent conviction unless the delay prejudiced the defendant's right to present a defense. State v. Golden, 185 Wis. 2d 763, 519 N.W.2d 659 (Ct. App. 1994).

A person taken into custody on a probation hold while an investigation is made to determine if a probation violation has occurred is not under arrest and not subject to the requirement of a probable cause hearing within 48 hours of a warrantless arrest. State v. Martinez, 198 Wis. 2d 222, 542 N.W.2d 215 (Ct. App. 1995), 94−3006.

A determination of probable cause made within 48 hours of a warrantless arrest generally meets the promptness requirement; if a hearing is held more than 48 hours following an arrest the burden shifts to the government to demonstrate an emergency or extraordinary circumstances. County of Riverside v. McLaughlin, 500 U.S. 44, 114 L. Ed. 2d 49 (1991).

970.02 Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

(a) Of the charge against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

(b) Of his or her right to counsel and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.

(c) That the defendant is entitled to a preliminary examination if charged with a felony in any complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, unless waived in writing or in open court, or unless the defendant is a corporation or limited liability company.

(2) The judge shall admit the defendant to bail in accordance with ch. 969.

(3) Upon request of a defendant charged with a misdemeanor, the judge shall immediately set a date for the trial.

(4) A defendant charged with a felony may waive preliminary examination, and upon the waiver, the judge shall bind the defendant over for trial.

(5) If the defendant does not waive preliminary examination, the judge shall forthwith set the action for a preliminary examination under s. 970.03.

(6) In all cases in which the defendant is entitled to legal representation under the constitution or laws of the United States or this state, the judge or magistrate shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under s. 977.07 (1).

(7) If the offense charged is one specified under s. 165.83 (2) (a), the judge shall determine if the defendant's fingerprints, photographs and other identifying data have been taken and, if not, the judge shall direct that this information be obtained.

(8) If the offense charged is a violent crime, as defined in s. 165.84 (7) (ab), the judge shall determine if a biological specimen has been obtained from the defendant under s. 165.84 (7), and, if not, the judge shall direct that a law enforcement agency or tribal law enforcement agency obtain a biological specimen from the defendant and submit it to the state crime laboratories as specified in rules promulgated by the department of justice under s. 165.76 (4). If the judge requires the defendant to provide a specimen under this subsection or if a biological specimen has already been obtained from the defendant, the judge shall inform the defendant that he or she may request expungement under s. 165.77 (4).

History: 1973 c. 45; 1975 c. 39; 1977 c. 29, 449; 1979 c. 356; 1981 c. 144; 1987 a. 151; 1993 a. 112, 486; 2013 a. 20, 214.

The failure to inform the defendant of an applicable mandatory minimum sentence violated sub. (1) (a). State v. Thompson, 2012 WI 90, 342 Wis. 2d 674, 818 N.W.2d 904, 09−1505.

970.03 Preliminary examination. (1) A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. A preliminary examination may be held in conjunction with a bail revocation hearing under s. 969.08 (5) (b), but separate findings shall be made by the judge relating to the preliminary examination and to the bail revocation.

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of $500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(3) A plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof.

(4) (a) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.051, 948.06, 948.085, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others

considered by the court to be supportive of the complainant or defendant, the service representative, as defined in s. 895.45 (1) (c), or other persons required to attend, if the court finds that the state or the defendant has established a compelling interest that would likely be prejudiced if the persons were not excluded. The court may consider as a compelling interest, among others, the need to protect a complainant from undue embarrassment and emotional trauma.

(b) In making its order under this subsection, the court shall set forth specific findings sufficient to support the closure order. In making these findings, the court shall consider, and give substantial weight to, the desires, if any, of the complainant. Additional factors that the court may consider in making these findings include, but are not limited to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family.

(c) The court shall make its closure order under this subsection no broader than is necessary to protect the compelling interest under par. (a) and shall consider any reasonable alternatives to full closure of the entire hearing.

(5) All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross−examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross−examination.

(6) During the preliminary examination, the court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(7) If the court finds probable cause to believe that a felony has been committed by the defendant, it shall bind the defendant over for trial.

(8) If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action.

(9) If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith.

(10) In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information filed pursuant to ch. 971. Section 970.04 shall apply to any dismissed count.

(12) (a) In this subsection:

1. "Hospital" has the meaning designated in s. 50.33 (2).

2. "Local health department" has the meaning given in s. 250.01 (4).

(b) At any preliminary examination, a report of one of the crime laboratory's, the state laboratory of hygiene's, a federal bureau of investigation laboratory's, a hospital laboratory's or a local health department's findings with reference to all or any part of the evidence submitted, certified as correct by the attorney general, the director of the state laboratory of hygiene, the director of the federal bureau of investigation, the chief hospital administrator, the local health officer, as defined in s. 250.01 (5), or a person designated by any of them, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness.

(c) At any preliminary examination in Milwaukee County, a latent fingerprint report of the city of Milwaukee police department bureau of identification division's latent fingerprint identification unit, certified as correct by the police chief or a person designated by the police chief, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness.

(13) Testimony may be received into the record of a preliminary examination by telephone or live audiovisual means if the proponent shows good cause or if the testimony is used to prove an element of an offense under s. 943.201 (2) or 943.203 (2).

(14) (a) In this subsection, "child" means a person who is younger than 16 years old when the preliminary examination commences.

(b) At any preliminary examination, the court shall admit an audiovisual recording of a statement under s. 908.08 upon making the findings required under s. 908.08 (3). The child who makes the statement need not be called as a witness and, under the circumstances specified in s. 908.08 (5) (b), may not be compelled to undergo cross−examination.

History: 1975 c. 184; 1977 c. 449; 1979 c. 112, 332; 1985 a. 267; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 332 s. 64; 1987 a. 403; Sup. Ct. Order, 158 Wis. 2d xvii (1990); 1991 a. 193, 276; 1993 a. 27, 98, 227, 486; 1995 a. 456; 1997 a. 252; 1999 a. 111; 2001 a. 103; 2003 a. 36; 2005 a. 42, 155, 277; 2007 a. 97, 116; 2011 a. 285.

Judicial Council Note, 1990:: [Re amendment of (13)] The right to confront one's accusers does not apply to the preliminary examination, and since credibility is not an issue, demeanor evidence is of less significance than at trial. For these reasons, a party should not be permitted to prevent the admission of telephone testimony, although the proponent of such evidence should bear the burden of showing good cause for its admission. [Re Order eff. 1−1−91]

While hearsay relied upon in support of a criminal complaint requires some basis for crediting its reliability, whether the informants are named or not, that requirement is satisfied if the hearsay is based upon observation of the informants. State ex rel. Cullen v. Ceci, 45 Wis. 2d 432, 173 N.W.2d 175 (1970).

There is no obligation on a magistrate to conduct an investigation to verify the contents of a criminal complaint. That is the duty of the state, and if it fails to put sufficient facts before the magistrate to show probable cause, the complaint must fail even though clues and leads that could provide that information are revealed in the complaint. State ex rel. Cullen v. Ceci, 45 Wis. 2d 432, 173 N.W.2d 175 (1970).

At the preliminary hearing, a defendant is entitled to cross−examine witnesses who identified him at the hearing and who also identified him at a lineup, because if the lineup was unfair, the identification evidence might be suppressed. Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

A ruling on admissibility of evidence at a preliminary hearing is not res adjudicata at the trial. Meunier v. State, 46 Wis. 2d 271, 174 N.W.2d 277 (1970).

It was not error for the magistrate and trial court to fail to sequester witnesses without motion by the defendant, especially in the absence of a showing of prejudice. Abraham v. State, 47 Wis. 2d 44, 176 N.W.2d 349 (1970).

A bind over was not invalid because the judge stated that it was "for the purpose of accepting a plea." Dolan v. State, 48 Wis. 2d 696, 180 N.W.2d 623 (1970).

A defendant is not entitled to call witnesses for pretrial discovery or to shake the credibility of the state's witness. State v. Knudson, 51 Wis. 2d 270, 187 N.W.2d 321 (1971).

A defendant who has been indicted by a grand jury is not entitled to a preliminary examination. State ex rel. Welch v. Waukesha County Circuit Court, 52 Wis. 2d 221, 189 N.W.2d 417 (1971).

When the preliminary examination is not timely held, personal jurisdiction is lost, but when the defendant on arraignment enters a plea, the defense is waived. Armstrong v. State, 55 Wis. 2d 282, 198 N.W.2d 357 (1972).

Defense counsel should be allowed to cross−examine a state's witness to determine the plausability of the witness, but not to attack the witness's general trustworthiness. Wilson v. State, 59 Wis. 2d 269, 208 N.W.2d 134 (1973).

The purpose of a hearing under sub. (1) is to determine whether a felony, whether charged or not, probably was committed. After bind over the prosecutor may charge any crime not wholly unrelated to transactions and facts adduced at the preliminary examination. Wittke v. State ex rel. Smith, 80 Wis. 2d 332, 259 N.W.2d 515 (1973).

Appellate review of a preliminary hearing is limited to determining whether the record contains competent evidence to support the examining magistrate's exercise of judgment. Although motive is not an element of any crime and does not of itself establish guilt or innocence, evidence of motive may be given as much weight as the fact finder deems it is entitled to at the preliminary hearing or trial. State v. Berby, 81 Wis. 2d 677, 260 N.W.2d 798 (1978).

Sub. (8) neither limits a prosecutor's discretion to prosecute criminal actions nor prohibits a second examination under s. 970.04. State v. Kenyon, 85 Wis. 2d 36, 270 N.W.2d 160 (1978).

This section does not require that proof of the exact time of an offense be shown. State v. Sirisun, 90 Wis. 2d 58, 279 N.W.2d 484 (Ct. App. 1979).

In finding probable cause, the court properly took judicial notice of the fact that rapid consumption of 1/2 quart of liquor probably caused a young girl's death. State ex rel. Cholka v. Johnson, 96 Wis. 2d 704, 292 N.W.2d 835 (1980).

An accused does not have a constitutional right to make a closing argument at a preliminary examination. State ex rel. Funmaker v. Klamm, 106 Wis. 2d 624, 317 N.W.2d 458 (1982).

If any reasonable inference supports a conclusion that the defendant probably committed a crime, the magistrate must bind over the defendant. State v. Dunn, 117 Wis. 2d 487, 345 N.W.2d 69 (Ct. App. 1984); aff'd. 121 Wis. 2d 389, 359 N.W.2d 151 (1984).

The state has the right to appeal a dismissal when it believes an error of law was committed. An uncorroborated confession alone was sufficient to support a probable cause finding. State v. Fry, 129 Wis. 2d 301, 385 N.W.2d 196 (Ct. App. 1985).

Mandatory closure of a hearing solely at the request of a complaining witness over the objection of the defendant violates the right to a public trial. Stevens v. Manitowoc Cir. Ct., 141 Wis. 2d 239, 414 N.W.2d 832 (1987).

If an appellate court stays the trial court proceedings on an interlocutory appeal, sub. (2) does not set a mandatory time limit for the preliminary hearing upon remittitur. State v. Horton, 151 Wis. 2d 250, 445 N.W.2d 46 (Ct. App. 1989).

An unconstitutionally obtained confession may be admitted and serve as the sole basis for bindover at a preliminary examination. State v. Moats, 156 Wis. 2d 74, 457 Wis.2d 299 (1990).

A defendant claiming error at a preliminary examination may obtain relief only prior to trial; the defendant may seek interlocutory review from the court of appeals under s. 809.50. State v. Webb, 160 Wis. 2d 622, 467 N.W.2d 108 (1991).

Adjourning a preliminary examination for cause is within the court's discretion. State v. Selders, 163 Wis. 2d 607, 472 N.W.2d 526 (Ct. App. 1991).

A court commissioner's determinations of admissibility of evidence will be upheld absent an erroneous exercise of discretion; the reviewing court then determines whether, if believed, the evidence would permit a reasonable magistrate to conclude that the defendant probably committed the crime. State v. Lindberg, 175 Wis. 2d 332, 500 N.W.2d 322 (Ct. App. 1993).

If a bindover decision is made by a court commissioner or circuit judge, review must be by a motion to dismiss brought in circuit court. Habeas corpus is not available to review a bindover. Dowe v. Waukesha County Circuit Ct. 184 Wis. 2d 724, 516 N.W.2d 714 (1994).

Single count complaints under sub. (7) and multiple count complaints under sub. (10) are to receive the same procedural treatment. In multiple count complaints a court must dismiss any count for which it believes there is not probable cause to believe a felony has been committed by the defendant. The specific felony charged need not be proved and it is inadvisable for the court to opine as to what felony was probably committed. Evidence that is not transactionally related to a count for which bind over is considered proper may not form the basis for a count in an ensuing information, but the information may include any count that is transactionally related to a count on which the defendant is bound over. State v. Williams, 198 Wis. 2d 516, 544 N.W.2d 406 (1996), 93−2444. See also State v. Williams, 198 Wis. 2d 479, 544 N.W.2d 400 (1996), 93−2517 and State v. Akins, 198 Wis. 2d 495, 544 N.W.2d 392 (1996), 94−1872.

Following a bindover at a preliminary hearing, the proper test for reviewing a challenge to an information that alleges wholly new charges not accompanied by the original charge is the sufficiency of evidence test. State v. Cotton, 2003 WI App 154, 266 Wis. 2d 308, 668 N.W.2d 346, 02−2923.

The purpose of a preliminary examination is limited to an expeditious determination of whether probable cause exists for the state to proceed with felony charges against a defendant. This limited purpose does not permit a criminal defendant to compel discovery in anticipation of the hearing. There is no 6th amendment right, based on effective assistance of counsel, and no compulsory process right to subpoena police reports and other non−privileged materials prior to the examination. State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06−1826.

It was not proper to dismiss a criminal charge added in the information because the prosecutor successfully objected at the preliminary hearing to questions that were relevant to that crime but not to the crime charged in the complaint. State v. White, 2008 WI App 96, 312 Wis. 2d 799, 754 N.W.2d 214, 07−2061.

Sub. (5) does not create a confrontation right. It does not require the state to present a defendant with hearsay declarants for cross−examination, rather it "permits cross−examination of only those people actually called to the stand." State v. O'Brien, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8, 12−1769.

970.032 Preliminary examination; juvenile under original adult court jurisdiction. (1) Notwithstanding s. 970.03, if a preliminary examination is held regarding a juvenile who is subject to the original jurisdiction of the court of criminal jurisdiction under s. 938.183 (1), the court shall first determine whether there is probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b), or (c), whichever is applicable. If the court does not make that finding, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

(2) If the court finds probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable.

History: 1993 a. 98; 1995 a. 77, 352; 1997 a. 35, 205; 2005 a. 344.

This section does not violate a defendant's right to equal protection. State v. Martin, 191 Wis. 2d 647, 530 N.W.2d 420 (Ct. App. 1995).

The juvenile bears the burden of proof to demonstrate that the factors under sub. (2) support removing jurisdiction to the juvenile court. The removal decision is within the discretion of the trial court. State v. Verhagen, 198 Wis. 2d 177, 542 N.W.2d 189 (Ct. App. 1995), 94−2823.

Sub. (2) (a) allows the trial court to balance the treatment available in the juvenile system and adult system and requires it to decide under the facts of the case which treatment will better benefit the juvenile. State v. Dominic E.W. 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998), 97−2446.

Sub. (2) is not unconstitutionally vague. State v. Armstead, 220 Wis. 2d 626, 583 N.W.2d 444 (Ct. App. 1998), 97−3056.

Sub. (2) makes no provision for the admission of hearsay at a reverse waiver hearing. When a statute does not specifically authorize hearsay, it is generally prohibited. State v. Kleser, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144, 07−2827.

A juvenile has a right to a reverse waiver hearing after the criminal court finds probable cause to believe that the juvenile has committed the exclusive original jurisdiction violation or violations of which he or she is accused. At the hearing, the juvenile must prove all elements set out in sub. (2) (a), (b), and (c) by a preponderance of the evidence. The juvenile must be given reasonable latitude to offer admissible evidence to satisfy his or her burden on the three elements, including evidence about the offense, supplementing the facts used to establish probable cause, to put the offense in context. The juvenile may not offer evidence at the hearing for the purpose of contradicting the offense charged. State v. Kleser, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144, 07−2827.

When a juvenile is charged in adult court with a violation of one of the offenses enumerated in s. 938.183 (1), the juvenile is entitled to a preliminary examination under sub. (1) at which the court must find that there is probable cause to believe that the juvenile has committed the violation of which he or she is accused if the adult court is to retain exclusive original jurisdiction of the juvenile. This means that the court should make a specific finding on the record that there is probable cause to believe the juvenile committed the specific s. 938.183 (1) crime charged in the complaint. State v. Toliver, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251, 12−0393.

If an adult court's determination of probable cause in a preliminary examination under this section relates to an unspecified felony and the facts are undisputed, an appellate court may review the record independently to determine whether the court did find probable cause to believe that the juvenile has committed the violation of which he or she is accused. State v. Toliver, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251, 12−0393.

970.035 Preliminary examination; juvenile younger than 15 years old. Notwithstanding s. 970.03, if a preliminary examination under s. 970.03 is held regarding a juvenile who was waived under s. 938.18 for a violation which is alleged to have occurred prior to his or her 15th birthday, the court may bind the juvenile over for trial only if there is probable cause to believe that a crime under s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31 or 943.10 (2), 943.32 (2) or 961.41 (1) has been committed or that a crime that would constitute a felony under chs. 939 to 948 or 961 if committed by an adult has been committed at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9). If the court does not make any of those findings, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

History: 1987 a. 27; 1993 a. 98; 1995 a. 77, 448; 1997 a. 35, 205.

970.038 Preliminary examination; hearsay exception. (1) Notwithstanding s. 908.02, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.

(2) A court may base its finding of probable cause under s. 970.03 (7) or (8), 970.032 (2), or 970.035 in whole or in part on hearsay admitted under sub. (1).

History: 2011 a. 285.

This section is constitutional. The scope of preliminary examinations is limited to determining whether there is probable cause to believe that a defendant has committed a felony. There is no constitutional right to confrontation at a preliminary examination. Further, due to the limited scope of preliminary examinations, the admission of hearsay evidence does not violate petitioners' rights to compulsory process, effective assistance of counsel, or due process. State v. O'Brien, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8, 12−1769.

Application of this section, which first became effective after the date of the alleged offense, did not constitute an ex post facto violation because it affects only the evidence that may be admitted at the preliminary hearing and does not alter the quantum or nature of evidence necessary to convict the defendant. State v. Hull, 2015 WI App 46, 363 Wis. 2d 603, 867 N.W.2d 419, 14−0365.

970.04 Second examination. If a preliminary examination has been had and the defendant has been discharged, the district

attorney may file another complaint if the district attorney has or discovers additional evidence.

History: 1993 a. 486.

If the state has no additional new or unused evidence upon which to base a 2nd complaint, a preliminary examination order discharging a defendant is appealable. Wittke v. State ex rel. Smith, 80 Wis. 2d 332, 259 N.W.2d 515 (1977).

When a first preliminary examination became chaotic, the prosecution properly abandoned the proceedings before presenting all its evidence and reissued the complaint. State v. Brown, 96 Wis. 2d 258, 291 N.W.2d 538 (1980).

The state is not barred from recharging a defendant, whether or not it has new evidence. State v. Hoffman, 106 Wis. 2d 185, 316 N.W.2d 143 (Ct. App. 1982).

This section allows for issuance of a second complaint if the district attorney has evidence that was not used at the first preliminary. "Unused" evidence in the context of a preliminary hearing means unused by the court in reaching its decision whether to bind the defendant over for trial. State v. Twaite, 110 Wis. 2d 214, 327 N.W.2d 700 (1983).

A complaint may be reissued when "new or unused" evidence would support a finding of probable cause. What constitutes new or unused evidence is not easily definable, but it is not evidence that is merely cumulative or corroborative and is determined by applying common sense. State v. Johnson, 231 Wis. 2d 58, 604 N.W.2d 902 (Ct. App. 1999), 98−2881.

This section specifically limits the availability of a second preliminary examination and precludes a request for a de novo hearing under the more general s. 757.69 (8). State v. Gillespie, 2005 WI App 35, 278 Wis. 2d 630, 693 N.W.2d 320, 04−1758.

970.05 Testimony at preliminary examination; payment for transcript of testimony. (1) The testimony at the preliminary examination shall be transcribed if requested by the district attorney, the defendant or an attorney representing the defendant or ordered by the judge to whom the trial is assigned. The reporter shall file such transcript with the clerk within 10 days after it is requested.

(2) (a) When a transcript is requested under sub. (1) by someone other than a person specified in par. (b) or (c), the county shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

(b) When a transcript is requested under sub. (1) by the state public defender or by a private attorney appointed under s. 977.08, the state public defender shall pay the cost of the original from the appropriation under s. 20.550 (1) (f) and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

(c) When a transcript is requested under sub. (1) by a defendant who is not indigent under ch. 977 or by an attorney retained by a defendant who is not indigent under ch. 977, the defendant shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

History: 1993 a. 437; 1995 a. 199.

Counsel is not entitled to a free copy of the transcript if the original is reasonably available. State v. Schneidewind, 47 Wis. 2d 110, 176 N.W.2d 303 (1970).