CHAPTER 955.

PROCEEDINGS BEFORE AND AT TRIAL.

955.01 Discharge of defendant. An imprisoned defendant charged with having committed a felony shall be bailed without sureties if no indictment or information is filed against him before the end of 6 months after he is committed to await trial.

History: 1961 c. 561.

Comment of Judicial Council 1961: "Felony" is here now more appropriate than "crime". The other changes are to clarify the situation after State v. Brill, 1 Wis. (2d) 288, 83 NW (2d) 721 (1957), by making the penalty for a district attorney's failure to file an information apply only where the defendant is imprisoned, and by reducing the penalty to release on bail without sureties instead of discharge. (Bill 235, A)

A review of Wisconsin criminal procedure. 1966 WLR 430.

955.02 Arrest of defendant. If an indictment or an information is filed against a defendant who is not in custody, process for his arrest shall issue forthwith.

955.03 Copy of indictment or information. As soon as may be after the filing of an indictment or an information for first degree murder the defendant shall be served with a copy thereof by the sheriff, and at least 24 hours before trial.

955.04 Subpoena. Any defendant shall have compulsory process to compel the attendance of witnesses in his behalf.

History: 1961 c. 561.

955.05 Copy of information. Every person indicted or informed against for a felony shall be entitled to a copy of the indictment or information and of all indorsements thereon without charge.

History: 1961 c. 561.

955.07 Alibi to be pleaded. In courts of record, if the defendant intends to rely upon an alibi as a defense, he shall give to the district attorney written notice thereof on the day of arraignment, stating particularly the place where he claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to his alibi, if known to the defendant. In default of such notice, evidence of the alibi shall not be received unless the court, for good cause shown, shall otherwise order.

That the transcript of the preliminary was not available at the time of arraignment afforded no valid excuse for failure to serve timely notice, where it was clear from the record that both the defendant and his attorney were present at the preliminary hearing, heard the testimony, and knew the exact nature of the charges against the defendant, including when the crimes occurred. Jensen v. State, 36 W (2d) 598, 153 NW (2d) 566.

955.075 Arraignment. A defendant charged with a misdemeanor may be arraigned on the complaint described in s. 954.02 and set forth in s. 960.36.

History: 1961 c. 561.

The term "arraignment" refers not to the initial appearance before a magistrate, but only to the appearance for the purpose of reading and filing, and pleading to, the information in a court having jurisdiction to accept such a plea and to impose sentence. The functions of the magistrate at the initial appearance of an accused following the latter's arrest are limited to formally charging him with the offense for which he has been arrested, informing him of his right to counsel and of his right to have a preliminary examination, and setting bail. Eskra v. State, 29 W (2d) 212, 138 NW (2d) 173.

955.08 Plea if accused stands mute. If on the arraignment the defendant fails or refuses to plead, a plea of not guilty shall be entered.

This section applies to criminal contempts where summary proceedings are not proper. State ex rel. Reynolds v. County Court, 11 W (2d) 560, 105 NW (2d) 876.

955.09 Pleas and motions before trial; waiver of jeopardy. (1) All pleas in abatement or in bar, demurrers and motions to quash are abolished, and defenses and objections which may or must be raised before trial shall hereafter be raised only by motion to dismiss or for appropriate relief as herein provided.

(2) Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(3) Defenses and objections based on defects in the institution of the proceedings, insufficiency of the information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence (except confessions) must be raised before trial by motion or be deemed waived. But the court may, in its discretion, entertain such motion at a later stage of the trial, in which case the defendant waives any jeopardy that may have attached. A motion to suppress evidence shall be so entertained, with waiver of jeopardy, when it appears that defendant is surprised by the state's possession of such evidence.

(4) The motion shall be made at least 10 days before the trial of the action, unless the court permits it to be made within a reasonable time thereafter. In all cases where a plea is entered less than 10 days before trial the motion may be made at the time the plea is entered.

(5) The motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at such trial. Issues of fact arising on such motion shall be tried by a jury, if that is required by the constitution or any statute, unless waived, and all other issues of fact arising on such motion shall be tried by the court without a jury, in a summary manner, on affidavits or otherwise as the court may direct.

(6) If the court grants a motion to dismiss based on a defect in the indictment, information or complaint, or in the institution of the proceedings, it may order that the defendant be held in custody or that his bail be continued for a specified time pending issuance of a new summons or warrant or filing of a new indictment, information or complaint.

(7) If the motion is based upon a misnomer, the court shall forthwith amend the indictment, information or complaint in that respect, and require the defendant to plead thereto.

(8) No complaint, indictment, information, process, return or other proceedings shall be dismissed or reversed for any error or mistake where the case and the identity of the defendant may be rightly understood by the court; and the court may order an amendment curing such defects.

History: 1961 c. 561.

Cross Reference: For error sufficient to reverse judgment, see 274.37.

A plea of guilty is like a demurrer in that the defendant admits the facts charged but not the crime. If the insufficiency of the information is of such a nature that no crime known to law has been alleged the defect is not waived by a guilty plea. Where in spite of the insufficiency of an information some crime is alleged, then (3) may become operative, in which event the objection to the sufficiency must be raised before trial or it will be deemed to have been waived. The entering of a plea of guilty is not a trial but the waiver thereof, and in such a case (3) does not apply because the requirement of that section has not happened in that there has yet been no trial. [Language in Spoo v. State, 219 Wis. 285 to the contrary, overruled.] State v. Lampe, 26 W (2d) 646, 133 NW (2d) 349.

955.10 Prisoner, when tried. Every defendant in prison shall, if he requests it, be tried not later than the next term of court after his imprisonment began or he shall be bailed without sureties, unless it appears to the court that witnesses on behalf of the state have been enticed or kept away or are prevented from attending the court by sickness or accident.

This section cannot form the basis for dismissal of criminal charges on grounds of denial of the constitutional right to a speedy trial. Kopacka v. State, 22 W (2d) 457, 126 NW (2d) 78.

955.11 Proof of motion. When a dilatory motion is interposed, the court may refuse to receive it until the truth thereof is supported by affidavit or other evidence.

955.12 Jurisdiction. The courts possess the same power and jurisdiction to try prosecutions upon information and to issue writs and process and do all other acts therein as they possess in prosecutions upon indictment.

955.13 Information; who to file. All informations shall be filed in the trial court by the district attorney as informant, and he shall subscribe his name thereto. In the absence or disability of the district attorney a deputy district attorney may sign and file informations, but if there is no deputy, an assistant may do so.

955.14 Crimes, how charged; joinder. (1) The crime charged shall be stated in plain, concise language, without unnecessary repetition. Different crimes and different degrees of the same crime may be joined in one information, indictment or complaint.

(2) The information, indictment or complaint shall state the crime or charge in plain, concise language, without unnecessary repetition and shall contain the name of the court in which the action is pending, the title of the action, the name of the defendant or a description sufficient to identify him, and a citation of the statute which he is charged with having violated, and shall conclude with the words "against the peace and dignity of the state."

(3) No indictment, information or complaint shall be invalid nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which does not tend to the prejudice of the defendant.

(4) The indictment, information or complaint is sufficient after verdict if it describes the crime in the words of the statute, but other words conveying the same meaning may be used.

History: 1961 c. 561.

955.15 Law relating to indictments applicable. All provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment shall, to the same extent and in the same manner, as near as may be, apply to informations and complaints and all prosecutions and proceedings thereon.

History: 1961 c. 561.

955.17 District attorney's duties. (1) The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime whereon the defendant has been held for trial and file an information setting forth the crime committed, according to the evidence on such examination.

(2) If the district attorney determines that an information ought not to be filed, he shall subscribe and file with the clerk of the court a statement of his reasons for not filing an information. Such statement shall be filed at or before the term of court at which the defendant is held for trial. The court or presiding judge shall examine the statement and the evidence filed, and if he is not satisfied with such statement, the district attorney shall file an information and bring the case to trial. If said statement is satisfactory the judge shall indorse "approved" upon it. Thereupon the action shall be dismissed and the defendant shall be discharged.

See note to 954.12, citing State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

955.18 Preliminary examination; when a prerequisite to information. (1) No information in a felony case shall be filed until the defendant has had a preliminary examination unless he waives such examination, except that informations may be filed without examination against fugitives from justice within the meaning of the constitution and laws of the United States and against corporations. The omission of a preliminary examination shall not invalidate any information unless the defendant moves to dismiss.

(2) (a) Upon good cause shown the trial court may in its discretion remand the cause to the magistrate for a preliminary examination, upon motion made pursuant to s. 955.09. Good cause means:

1. Preliminary examination was waived; and
2. Defendant had not had advice of counsel prior to such waiver; and
3. Defendant denies that probable cause exists to hold him for trial; and
4. Defendant intends to plead not guilty.

(b) The bail bond, if any, shall remain in effect pending the determination of the magistrate, and, if defendant is held for trial, the bond shall remain in effect pending trial. If no bail was given, defendant shall remain in custody until discharged or until bail is given.

History: 1961 c. 561.

Where a defendant was extradited from Illinois and an information was filed without preliminary examination, defendant cannot claim a denial of equal protection of the law and a violation of due process. The extradition process satisfies the purpose of a preliminary hearing. Johns v. State, 14 W (2d) 119, 109 NW (2d) 490.

See note to Art. I, sec. 7, citing Sparkman v. State, 27 W (2d) 92, 133 NW (2d) 776.

Where a defendant charged with a felony appears without counsel and waives counsel, it is the duty of the trial court to advise defendant of his right to a preliminary hearing before proceeding further. State v. Strickland, 27 W (2d) 623, 135 NW (2d) 295.

Denial of a motion made pursuant to (2) (a) for remand (following defendant's waiver of preliminary examination) did not constitute an abuse of discretion, where the

trial court then had before it an uncontradicted statement of the district attorney that the defendant had had considerable experience before that court and others; the statement of defendant's counsel that he needed the preliminary examination to adequately prepare for trial; and a handwritten affidavit theretofore submitted by defendant disclosing the latter's familiarity with criminal law and procedure, from all of which it could be concluded that defendant's waiver was made intelligently. State v. Camara, 28 W (2d) 365, 137 NW (2d) 1.

The filing of an information is not dependent jurisdictionally upon a valid complaint or preliminary examination. A defendant validly arrested without a warrant can waive the preliminary and be bound over. Pillsbury v. State, 31 W (2d) 87, 142 NW (2d) 187.

Non-use of the preliminary examination; a study of current practices. Miller-Dawson, 1964 WLR 252.

955.20 Second examination. If a preliminary examination has been had and the defendant has been discharged for want of evidence, and the district attorney afterwards discovers evidence sufficient, in his judgment, to convict the defendant, he may cause another complaint to be made, and thereupon further proceedings shall be had.

History: 1961 c. 561.

This section is directory only and relates solely to the duty of district attorneys, and it does not provide the accused with a defense or operate as a bar to subsequent proceedings involving the same offense. It does not cover cases where, after the first preliminary hearing, evidence still exists, whether because of improper exclusion on the first hearing or of failure to adduce it or of being unknown to the district attorney; nor does the statute prohibit the making of a second complaint for the same charge. Tell v. Wolke, 21 W (2d) 613, 124 NW (2d) 655.

955.21 Form of information. The information may be in the following form:

STATE OF WISCONSIN, ... County, } In .... Court.

The State of Wisconsin,

v.

Name of defendant.

I, ..., district attorney for said county, hereby inform the court that on the .... day of ...., in the year 19.., at said county (name or alias of defendant) did (state the crime), contrary to section .... of the statutes and against the peace and dignity of the state.

Dated ...., 19...

...., District Attorney.

955.22 Prompt disposition of intrastate detainers. (1) REQUEST BY WARDEN OR SUPERINTENDENT. Whenever the warden or superintendent receives notice of an untried criminal case pending in this state against an inmate of a state prison, he shall, at the request of the inmate, send by certified mail a written request to the district attorney for prompt disposition of such case. The request shall state the sentence then being served, the date of parole eligibility, the approximate discharge or conditional release date, and prior decision relating to parole. If there has been no preliminary hearing on the pending case the request shall state whether the inmate waives such hearing and if so shall be accompanied by a written waiver signed by the inmate.

(2) DUTY OF DISTRICT ATTORNEY IN FELONY CASES. If the crime charged is a felony, the district attorney shall either move to dismiss the pending case or arrange a date for preliminary hearing as soon as convenient and notify the warden or superintendent of the prison thereof, unless such hearing has already been held or has been waived. After the preliminary hearing or upon waiver thereof the district attorney shall file an information (unless it has already been filed) and mail a copy thereof to the warden or superintendent for service on the inmate. He shall bring the case on for trial within 180 days after receipt of the request unless:

(a) No term of court at which the case may be tried is held within such period;

(b) The trial is continued for cause upon notice to the defendant or his counsel or upon motion of defendant, or is continued by stipulation; or

(c) The trial cannot be held within such period because of the absence, disability, or disqualification of the judge and inability to obtain the services of another judge within the period. In any case, the trial shall be held at the earliest possible time after the expiration of said period of 180 days.

(3) DUTY OF DISTRICT ATTORNEY IN MISDEMEANOR CASES. If the crime charged is a misdemeanor, the district attorney shall either move to dismiss the charge or bring it on for trial within 180 days after receipt of the request.

(4) PLEA OF GUILTY. If the defendant desires to plead guilty or nolo contendere to the complaint or to the information served upon him, he shall notify the district attorney thereof. The district attorney shall thereupon arrange for his arraignment as soon as possible and the court may receive the plea and pronounce judgment.

(5) CASES IN MORE THAN ONE COUNTY. If the defendant wishes to plead guilty to cases pending in more than one county, the several district attorneys involved may agree

with him and among themselves for all such pleas to be received in the appropriate court of one of such counties, and s. 956.01 (13) shall govern the procedure thereon so far as applicable.

(6) TRANSPORTATION AND CUSTODY OF PRISONER. The prisoner shall be delivered into the custody of the sheriff of the county in which he is to be plead or be tried, for transportation to the court, and he shall be retained in such custody during all proceedings under this section. The sheriff shall return him to the prison upon the completion of such proceedings and during any adjournments or continuances and between the preliminary hearing and the trial, except that if the department certifies a jail as being suitable to detain the prisoner he may be detained there until the court shall dispose of the case. His existing sentence continues to run and good time is earned under s. 53.11 while he is in such custody.

(7) WHEN FURTHER PROSECUTION BARRED. If the district attorney moves to dismiss any pending case or if it is not brought on for trial within the time herein specified the case shall be dismissed unless the defendant has escaped or otherwise prevented the trial, in which case the request for disposition of the case shall be deemed withdrawn and of no further legal effect. Nothing in this section prevents a trial after the period herein provided if a trial commenced within such period terminates in a mistrial, or a new trial is granted as provided by law.

History: 1961 c. 109.

A case should not be dismissed after 180 days where defendant had moved to suppress evidence within that period where the motion was still pending, since the motion in effect was for a continuance. State v. Fogle, 25 W (2d) 257, 130 NW (2d) 871.

955.24 Murder and manslaughter. It is sufficient in an indictment or information for murder to charge that the defendant did feloniously and with intent to kill murder the deceased. In any indictment or information for manslaughter it is sufficient to charge that the defendant did feloniously slay the deceased.

955.31 Theft; pleading and evidence; subsequent prosecutions. (1) In any criminal pleading for theft it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming him) of the value of (stating the value in money).

(2) Any criminal pleading for theft may contain a count for receiving the same property and the jury may find all or any of the persons charged guilty of either of the crimes.

(3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:

(a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme; or

(b) The property belonged to the same owner and was stolen by a person in possession of it; or

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. But an acquittal or conviction in any such case does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge. In case of a conviction on the original charge on a plea of guilty or nolo contendere, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge and in that event conviction does not bar a subsequent prosecution for any other acts of theft.

(4) does not apply to preliminary hearings. State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

955.34 Pleading judgment. In pleading a judgment or other determination of or proceeding before any court or officer it shall be sufficient to state that the judgment or determination was duly rendered or made or the proceeding duly had.

955.36 Lost information or indictment. In case of the loss or destruction of an information the district attorney may file another information, and the prosecution shall proceed without delay from that cause. In case of the loss or destruction of an indictment, an information may be filed.

955.37 Mistake in charging crime. When it appears before judgment that a mistake has been made in charging the proper crime, the defendant shall not be discharged

if there appears to be good cause to detain him in custody to answer to the crime, and the district attorney may forthwith file an information charging said crime. If the defendant has been charged or arraigned on a complaint, the complaint may be amended.

History: 1961 c. 561.

955.39 **Ownership, how alleged.** In an indictment, information or complaint for a crime committed in relation to property, it shall be sufficient to state the name of any one of several co-owners, or of any officer of any corporation or association owning the same.

History: 1961 c. 561.

955.395 **Possession of property, what sufficient.** In the prosecution of a crime committed upon or in relation to or in any way affecting real property or any crime committed by stealing, damaging or fraudulently receiving or concealing personal property, it is sufficient if it is proved that at the time the crime was committed either the actual or constructive possession or the general or special property in any part of such property was in the person alleged to be the owner thereof.

955.40 **Intent to defraud.** Where the intent to defraud is necessary to constitute the crime it is sufficient to allege the intent generally; and on the trial it shall be sufficient if there appears to be an intent to defraud the United States or any state or any person.

955.41 **Powers and duties of clerk.** (1) The clerk of the court shall, immediately upon the filing of an indictment or information, record the same in the book kept for that purpose in his office, and such record or certified copies therefrom may be read in evidence and shall have the same effect as the originals.

(2) The clerk of court shall keep a case file for all cases and matters brought in county court and he or one of his deputies, shall be present during the sessions of said court and shall make, keep and have care and custody of all records, books and papers of the court, perform all ministerial acts required of him by and under the direction of a county judge and when the court is not in session shall have power to take bail for the appearance of any person under arrest, subject to the revision of the court; and said clerk or one of his deputies may administer all necessary oaths, enter the orders and judgments of the court, and issue commitments and executions to enforce the same.

History: 1961 c. 561.