CHAPTER 971

PROCEEDINGS BEFORE AND AT TRIAL

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971.01 Filing of the information. (1) The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03 (10), shall file an information according to the evidence on such examination subscribing his name thereto.

(2) The information shall be filed with the clerk within 30 days after the completion of the preliminary examination or waiver thereof except that the district attorney may move the court wherein the information is to be filed for an order extending the period for filing such information for cause. Notice of such motion shall be given the defendant. Failure to file the information within such time shall entitle the defendant to have the action dismissed without prejudice.

971.02 Preliminary examination; when prerequisite to an information or indictment. (1) If the defendant is 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, no information or indictment shall be filed until the defendant has had a preliminary examination, unless he waives such examination in writing or in open court or unless he is a corporation. The omission of the preliminary examination shall not invalidate any information unless the defendant moves to dismiss prior to the entry of a plea.

(2) Upon motion and for cause shown, the trial court may remand the case for a preliminary examination. "Cause" means:

(a) The preliminary examination was waived; and

(b) Defendant did not have advice of counsel prior to such waiver; and

(c) Defendant denies that probable cause exists to hold him for trial; and

(d) Defendant intends to plead not guilty.

History: 1973 c. 45.

An objection to the sufficiency of a preliminary examination is waived if not raised prior to pleading. Wold v. State, 57 W (2d) 344, 204 NW (2d) 482.

When defendant waived preliminary examination and wished to plead, but the information was not ready and was only orally read into the record, the defendant is not harmed by acceptance of his plea before the filing of the information. Larson v. State, 60 W (2d) 768.

See note to Art. I, sec. 7, citing Gerstein v. Pugh, 420 US 103.

Preliminary examination potential. 58 MLR 159.

The grand jury in Wisconsin. Coffey, Richards, 58 MLR 518.

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

STATE OF WISCONSIN,
..... County,
In ..... Court.
The State of Wisconsin
vs.
..... (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 the defendant did (state the crime) .... contrary to section ..... of the statutes.

Dated ....., 19..,

..... District Attorney

An information charging an attempt is sufficient if it alleges the attempt plus the elements of the attempted crime. Wilson v. State, 59 W (2d) 269, 208 NW (2d) 134.

Where the victim's name was correctly spelled in the complaint but wrong on the information, the variance was immaterial. State v. Bagnall, 61 W (2d) 297, 212 NW (2d) 122.

971.04 Defendant to be present. (1) Except as provided in subs. (2) and (3), the defendant shall be present:

(a) At the arraignment;

(b) At trial;

(c) At all proceedings when the jury is being selected;

(d) At any evidentiary hearing;

(e) At any view by the jury;

(f) When the jury returns its verdict;

(g) At the pronouncement of judgment and the imposition of sentence;

(h) At any other proceeding when ordered by the court.

(2) A defendant charged with a misdemeanor may authorize his attorney in writing to act on his behalf in any manner, with leave of the court, and be excused from attendance at any or all proceedings.

(3) If the defendant is present at the beginning of the trial and shall thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absent himself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times. A defendant need not be present at the pronouncement or entry of an order granting or denying relief under s. 974.02 or 974.06. If he is not present, the time for appeal from any order under ss. 974.02 and 974.06 shall commence after either a copy has been served upon him or upon his attorney, if any. Service on the defendant may be made in the manner provided for service in civil actions or by mailing a copy to the defendant's last-known address or under s. 53.02 (5), if applicable.

History: 1971 c. 298.

971.05 Arraignment. The arraignment shall be in the trial court and shall be conducted in the following manner:

(1) The arraignment shall be in open court.

(2) If the defendant appears for arraignment without counsel, the court shall advise him of his right to counsel as provided in s. 970.02.

(3) The district attorney shall deliver to the defendant a copy of the indictment or information in felony cases and in all cases shall read the indictment, information or complaint to the defendant unless the defendant waives such reading. Thereupon the court shall ask him his plea.

(4) The defendant then shall plead unless in accordance with s. 971.31 he has filed a motion which requires determination before the entry of a plea. The court may extend the time for the filing of such motion.

Where through oversight, an arraignment was not held, it may be conducted after both parties had rested during the trial. Bies v. State, 53 W (2d) 322, 193 NW (2d) 46.

971.06 Pleas. (1) A defendant charged with a criminal offense may plead as follows:

(a) Guilty.

(b) Not guilty.

(c) No contest, subject to the approval of the court.

(d) Not guilty by reason of mental disease or defect. This plea may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged in the indictment, information or complaint.

(2) If a defendant stands mute or refuses to plead, the court shall direct the entry of a plea of not guilty on his behalf.

971.07 Multiple defendants. Defendants who are jointly charged may be arraigned separately or together, in the discretion of the court.

971.08 Pleas of guilty and no contest; withdrawal thereof. (1) Before the court accepts a plea of guilty or no contest, it shall:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted; and

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

(2) The court shall not permit the withdrawal of a plea of guilty or no contest later than 120 days after conviction.

(3) Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.

A court can consider defendant's record of juvenile offenses at a hearing on his guilty pleas prior to sentencing. McKnight v. State, 49 W (2d) 623, 182 NW (2d) 291.

When a plea agreement contemplates the nonprosecution of uncharged offenses the details of the plea agreement should be made a matter of record, whether it involves a recommendation of sentencing, a reduced charge, a nolle prosequi of charges, or "read ins" with an agreement of immunity, and a "read-in" agreement made after conviction or as part of a post-plea-of-guilty hearing to determine the voluntariness and accuracy of the plea should be a part of the sentencing hearing and made a matter of record. Austin v. State, 49 W (2d) 727, 183 NW (2d) 56.

A defendant may not withdraw a guilty plea simply because he did not specifically waive all of his constitutional rights, if the record shows he understood what rights he was waiving by the plea. After a plea of guilty the hearing as to the factual basis for the plea need not produce competent evidence which will satisfy the criminal burden of proof. Edwards v. State, 51 W (2d) 231, 186 NW (2d) 193.

It is sufficient for a court to inform a defendant charged with several offenses of the maximum penalty which could be imposed for each. The phrase "in connection with his appearance" as it appears in the guilty plea guidelines of the Burnett and Ernst cases should be deleted. Burkhalter v. State, 52 W (2d) 413, 190 NW (2d) 502.

A desire to avoid a possible life sentence by pleading guilty to a lesser charge does not alone render the plea involuntary. A claimed inability to remember does not require refusal of the plea where the evidence is clear that defendant committed the crime. State v. Herro, 53 W (2d) 211, 191 NW (2d) 889.

The proceedings following a plea of guilty were not designed to establish a prima facie case, but to establish the voluntariness of the plea and the factual basis therefor; hence if the defendant denies an element of the crime after pleading guilty, the court is required to reject the plea and set the case for trial, and not obliged to dismiss the action because of refusal to accept the guilty plea. Johnson v. State, 53 W (2d) 787, 193 NW (2d) 659.

A hearing on a motion to withdraw a guilty plea is to be liberally granted if the motion is made prior to sentence; it is discretionary if made thereafter and need not be granted if the record refutes the allegations. Defendant must raise a substantial issue of fact. Nelson v. State, 54 W (2d) 489, 195 NW (2d) 629.

When there is strong evidence of guilt a conviction will be sustained even against a defendant who, having pleaded guilty, nonetheless denies the factual basis for guilt. State v. Chabonian, 55 W (2d) 723, 201 NW (2d) 25.

A plea bargain which contemplates special concessions to another person requires careful scrutiny by the court. It must also be reviewed as to whether it is in the public interest. State ex rel. White v. Gray, 57 W (2d) 17, 203 NW (2d) 638.

A court has inherent power to refuse to accept a plea of guilty and may dismiss the charge on motion of the district attorney in order to allow prosecution on a 2nd complaint. State v. Waldman, 57 W (2d) 234, 203 NW (2d) 691.

It is not error for the court to accept a guilty plea before hearing the factual basis for the plea if a sufficient basis is ultimately presented. Staver v. State, 58 W (2d) 726.

The fact that defendant pled guilty with the understanding that his wife would be given probation on another charge does not necessarily render the plea involuntary. Seybold v. State, 61 W (2d) 227, 212 NW (2d) 146.

The defendant's religious beliefs regarding the merits of confessing one's wrongdoing and his desire to mollify his family or give in to their desires are self-imposed coercive elements and do not vitiate the voluntary nature of the defendant's guilty plea. Craker v. State, 66 W (2d) 222, 223 NW (2d) 872.

A defendant wishing to withdraw guilty plea must show by clear and convincing evidence that the plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent manifest injustice, as may be indicated in situations where (1) defendant was denied effective assistance of counsel; (2) the plea was not entered or ratified by defendant or a person authorized to so act in his behalf; (3) the plea was involuntary or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; and (4) defendant did not receive the concessions contemplated by the plea agreement and the prosecutor failed to seek them as promised therein. Birts v. State, 68 W (2d) 389, 228 NW (2d) 351.

As required by Ernst v. State, 43 W (2d) 661 and (1)(b), prior to accepting a guilty plea, the trial court must establish that the conduct defendant admits constitutes the offense charged or an offense included therein to which defendant has pleaded guilty; but where the plea is made pursuant to a plea bargain, the court need not probe as deeply in determining whether the facts would sustain the charge as it would were the plea nonnegotiated. Broadie v. State, 68 W (2d) 420, 228 NW (2d) 687.

Trial court did not abuse discretion by failing to inquire into the effect tranquilizer had on defendant's competence to enter plea. Jones v. State, 71 W (2d) 750, 238 NW (2d) 741.

Withdrawal of guilty plea prior to sentencing is not an absolute right but should be freely allowed when a fair and just reason for doing so is presented. Dudrey v. State, 74 W (2d) 480, 247 NW (2d) 105.

Guilty plea cannot be withdrawn on grounds that probation conditions were more onerous than expected. Garski v. State, 75 W (2d) 62, 248 NW (2d) 425.

See note to 939.74, citing State v. Pohlhammer, 78 W (2d) 516, 254 NW (2d) 478.

While courts have no duty to secure informed waivers of possible statutory defenses, under unique facts of case, defendant was entitled to withdraw guilty plea to charge barred by statute of limitations. State v. Pohlhammer, 82 W (2d) 1, 260 NW (2d) 678.

See note to 968.01, citing 63 Atty. Gen. 540.

Where a defendant knowingly entered a guilty plea and the state's evidence supported a conviction, the conviction is valid even though the defendant gave testimony inconsistent with the plea. Hansen v. Mathews, 424 F (2d) 1205.

Guilty pleas in Wisconsin. Bishop, 58 MLR 631.

Pleas of guilty; plea bargaining. 1971 WLR 583.

971.09 Plea of guilty to offenses committed in several counties. (1) Any person who admits that he has committed felonies or violations of s. 943.24, or both, in the county in which he is in custody and also in another county in this state, may apply to the district attorney of the county in which he is in custody to be charged with those crimes so that he may plead guilty and be sentenced for them in the county of custody. The application shall contain a description of all admitted crimes and the name of the county in which each was committed.

(2) Upon receipt of the application the district attorney shall prepare an information charging all the admitted crimes and naming in each count the county where each was committed. He shall send a copy of the information to the district attorney of each other county in which the defendant admits he committed crimes, together with a statement that the defendant has applied to plead guilty in the county of custody. Upon receipt of the information and statement, the district attorney of the other county may execute a consent in writing allowing the defendant to enter a plea of guilty in the county of custody, to the crime charged in the information and committed in the other county, and send it to the district attorney who prepared the information.

(3) The district attorney shall file the information in any court of his county having jurisdiction to try or accept a plea of guilty to the most serious crime alleged therein as to which, if alleged to have been committed in another county, the district attorney of that county has executed a consent as provided in sub. (2). The defendant then may enter a plea of guilty to all offenses alleged to have been committed in the county where the court is located and to all

offenses alleged to have been committed in other counties as to which the district attorney has executed a consent under sub. (2). Before entering his plea of guilty, the defendant shall waive in writing any right to be tried in the county where the crime was committed. The district attorney of the county where the crime was committed need not be present when the plea is made but his written consent shall be filed with the court.

(4) Thereupon the court shall enter such judgment, the same as though all the crimes charged were alleged to have been committed in the county where the court is located, whether or not the court has jurisdiction to try all those crimes to which the defendant has pleaded guilty under this section.

(5) The county where the plea is made shall pay the costs of prosecution if the defendant does not pay them, and is entitled to retain fees for receiving and paying to the state any fine which may be paid by the defendant. The clerk where the plea is made shall file a copy of the judgment of conviction with the clerk in each county where a crime covered by the plea was committed. The district attorney shall then move to dismiss any charges covered by the plea of guilty, which are pending against the defendant in his county, and the same shall thereupon be dismissed.

It is not error for the court to accept the plea before the amended complaint was filed, where defendant waived the late filing and was not prejudiced thereby. Failure to prepare an amended information prior to obtaining consents by the district attorneys involved does not invalidate the conviction where the consents were actually obtained and the defendant waived the defect. Failure to dismiss the charges in one of the counties does not deprive the court of jurisdiction. Failure of a district attorney to specifically consent as to one offense does not invalidate the procedure where the error is clerical. Peterson v. State, 54 W (2d) 370, 195 NW (2d) 837.

971.10 Speedy trial. (1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court.

(2) (a) The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.

(b) If the court is unable to schedule a trial pursuant to par. (a), the court shall request assignment of another judge pursuant to s. 751.03.

(3) (a) The court may continue a case for cause on its own motion or on application of any party. Further continuances may be granted for cause, but no continuance shall be for a period in excess of 60 days.

(b) Continuances may be granted on stipulation of the parties for periods not to exceed 60 days.

(4) Every defendant not tried in accordance with this section shall be discharged from custody or released from the obligations of his bond.

History: 1971 c. 40 s. 93; 1971 c. 46, 298; 1977 c. 187 s. 135.

The supreme court adopts the federal court applied balancing test, as appropriate to review the exercise of trial court's discretion on a request for the substitution of trial counsel, with the associated request for a continuance. Phifer v. State, 64 W (2d) 24, 218 NW (2d) 354.

Party requesting continuance on grounds of surprise must show: 1) actual surprise of unforeseeable development; 2) where surprise is caused by unexpected testimony, probability of producing contradictory or impeaching evidence; and 3) resulting prejudice if request is denied. See note to 971.23, citing Angus v. State, 76 W (2d) 191, 251 NW (2d) 28.

Delay of 84 days between defendant's first court appearance and trial on misdemeanor traffic charges was not so inordinate as to raise presumption of prejudice. State v. Mullis, 81 W (2d) 454, 260 NW (2d) 696.

971.11 Prompt disposition of intrastate detainers. (1) 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 the 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 examination on the pending case, the request shall state whether the inmate waives such examination, and, if so, shall be accompanied by a written waiver signed by the inmate.

(2) If the crime charged is a felony, the district attorney shall either move to dismiss the pending case or arrange a date for preliminary examination as soon as convenient and notify the warden or superintendent of the prison thereof, unless such examination has already been held or has been waived. After the preliminary examination 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 120 days after receipt of the request subject to s. 971.10.

(3) If the crime charged is a misdemeanor, the district attorney shall either move to dismiss the charge or bring it on for trial within 90 days after receipt of the request.

(4) If the defendant desires to plead guilty or no contest 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) 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. 971.09 shall govern the procedure thereon so far as applicable.

(6) The prisoner shall be delivered into the custody of the sheriff of the county in which the charge is pending 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 the proceedings and during any adjournments or continuances and between the preliminary examination 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 disposes of the case. His existing sentence continues to run and good time is earned under s. 53.11 while he is in custody.

(7) If the district attorney moves to dismiss any pending case or if it is not brought on for trial within the time specified in sub. (2) or (3) 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 specified in sub. (2) or (3) if a trial commenced within such period terminates in a mistrial or a new trial is granted.

971.12 Joinder of crimes and of defendants. (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

(2) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if he intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

(4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

Where 2 defendants were charged and the cases consolidated, and one then pleads guilty, there is no need for a severance, especially where the trial is to the court. Nicholas v. State, 49 W (2d) 678, 183 NW (2d) 8.

Severance is not required where the 2 charges involving a single act or transaction are so inextricably intertwined so as to make proof of one crime impossible without proof of the other. Holmes v. State, 63 W (2d) 389, 217 NW (2d) 657.

Due process of law was not violated, nor did the trial court abuse its discretion, by denial of defendant's motion to sever 3 counts of sex offenses from a count of first-degree murder. Bailey v. State, 65 W (2d) 331, 222 NW (2d) 871.

In a joint trial on charges of burglary and obstructing an officer, while evidence as to the fabrication of an alibi by defendant was probative as to the burglary, the substantial danger that the jury might employ such evidence as affirmative proof of the elements of that crime, for which the state was required to introduce separate and independent evidence showing guilt beyond a reasonable doubt, required the court to administer a clear and certain cautionary instruction that the jury should not consider evidence on the obstructing count as sufficient in itself to find defendant guilty of burglary. Peters v. State, 70 W (2d) 22, 233 NW (2d) 420.

Joinder was not prejudicial to defendant moving for severance where possibly prejudicial effect of inadmissable hearsay regarding other defendant was presumptively cured by instructions. State v. Jennaro, 76 W (2d) 499, 251 NW (2d) 800.

Joinder and severance. 1971 WLR 604.

971.13 Competency to proceed. No person who as a result of mental disease or defect is unable to understand the proceedings against him or to assist in his own defense, shall be tried, convicted, sentenced or committed for the commission of an offense so long as such incapacity endures.

As to traffic cases, see note to 345.34, citing 63 Atty. Gen. 328.

971.14 Examination of defendant with respect to competency to proceed. (1) Whenever there is reason to doubt a defendant's competency to proceed, the court shall:

(a) Hold a hearing to establish whether it is probable that the defendant committed the crime charged, except that if he has previously been bound over for trial after a preliminary examination or has been adjudged guilty but has not been sentenced, such hearing shall not be necessary.

(b) If the defendant is without counsel, provide him with the right to cross-examine state's witnesses and to call witnesses on his own behalf.

(c) At the conclusion of the hearing required by par. (a), make a finding on the issue of probable guilt.

(d) If the finding is in the affirmative, then proceed to determine the defendant's competency to proceed.

(e) If the finding is that the state has failed to prove the probability that the defendant has committed the crime charged, discharge the defendant, but the court may temporarily detain him so as to permit civil proceedings to be instituted under ch. 51 to determine his mental competency.

(2) When probable cause has been established pursuant to sub. (1), the court shall appoint at least one physician to examine and report upon the condition of the defendant. In lieu of such appointment, or in addition thereto, the court may order the defendant committed to a state or county mental health facility or other suitable facility for the purpose of examination for a specified period not to exceed 60 days. At the conclusion of the examination, the physician who examined the defendant, or the facility to which the defendant was committed, or the department if committed to a state institution, shall forward a written report of such examination in triplicate to the clerk. The report of the examination shall include:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense.

(3) The report of the examination shall be filed in triplicate with the clerk who shall cause copies to be delivered forthwith to the district attorney and to counsel for the defendant or to the defendant personally if he is not represented by counsel. The report shall not be otherwise disclosed until the hearing on the defendant's competency.

(4) The defendant's competency to proceed shall be promptly determined by the court. If neither the district attorney, the defendant nor the counsel for the defendant contest the finding of the report filed pursuant to sub. (2), the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue.

(5) If the court determines that the defendant lacks competency to proceed, the proceeding against the defendant shall be suspended and the court shall commit the defendant to the custody of the department to be placed in an appropriate institution of the department. The defendant shall be reexamined at 6-month intervals following commitment, or during any interim period if the department files a written report that the defendant appears to have become competent, that the defendant is not making continual progress toward regaining competency, or it has become apparent that the defendant will not soon become competent to stand trial, and a determination as to competency shall be made by the court following each reexamination. Each such determination shall be preceded by a hearing unless waived by the district attorney, defendant and defendant's counsel. If it is determined that the defendant has regained competency to proceed, the proceeding shall be resumed. At any time that it is determined that the defendant is not making further progress toward regaining competency, or if the defendant has not regained competency within 24 months of commitment, the court shall order the defendant to be discharged from the commitment subject to the right of the department or other person to proceed against the defendant under ch. 51.

Note: The changes made to subs. (4) and (5) by ch. 153, laws of 1975, are discussed in a note to the original bill (Assembly Bill 257) which may be found in the Legislative Reference Bureau.

(6) The fact that the defendant is not competent to proceed does not preclude any legal objection to the prosecution pursuant to s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

(7) When, notwithstanding the report filed pursuant to sub. (2), the defendant wishes to be examined by a physician or other expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purposes of such examination.

History: 1975 c. 39, 153, 199.

Claim that the trial court erred in not ordering a mental examination on the day of the trial (when 50 to 60 jurors were waiting in the courtroom), likewise had no merit, the record disclosing that 2-1/2 months prior thereto defendant was examined by 2 court-appointed psychiatrists who found him competent, no plea of insanity was entered, there was no showing that defendant's mental condition had in any way changed during the interim, and observation of defendant by the trial judge bolstered that conclusion. Nadolinski v. State, 46 W (2d) 259, 174 NW (2d) 483.

The report as to defendant's fitness for trial should not be admitted in evidence. It can be used to impeach the witness and to test the validity of the doctor's opinion. Gibson v. State, 55 W (2d) 110, 197 NW (2d) 813.

A jury trial is not necessary to determine defendant's fitness to stand trial but a meaningful hearing must be given; mere failure by counsel to protest is not enough. Commitment may not be for more than 6 months and defendant must be released or civil commitment proceedings started. State ex rel. Matalik v. Schubert, 57 W (2d) 315, 204 NW (2d) 13.

Ultimate retention of a defendant should be limited to 18 months, but such a defendant must be discharged from criminal commitment if it appears at any earlier time that a defendant has not regained competency and is not making

progress toward that goal. A defendant returned to the committing court when 6 months has elapsed after original commitment is entitled to a full due process hearing unless affirmatively waived by the state and the defendant. State ex rel. Haskins v. Dodge County Court, 62 W (2d) 250, 214 NW (2d) 575.

Where a person charged with a criminal offense is found to be unable to stand trial and committed under (5), to the department, the nature of his subsequent incarceration in a state institution is criminal. Conservatorship of Grams, 63 W (2d) 194, 216 NW (2d) 889.

The trial court's finding of "no reasonable doubt" as to defendant's competency to proceed is tantamount to a finding that there is no "reason to doubt" the defendant's competency to proceed. State v. McKnight, 65 W (2d) 582, 223 NW (2d) 550.

Committment under (1) and (5) serves to determine whether defendant ever would be sentenced; such detention does not violate double jeopardy or due process guarantees. Milewski v. State, 74 W (2d) 681, 248 NW (2d) 70.

Where accused had been found incompetent to stand trial and later released, court retained jurisdiction to order 60-day reexamination. State ex rel. Porter v. Wolke, 80 W (2d) 197, 257 NW (2d) 881.

A criminal defendant cannot be committed indefinitely solely because of lack of capacity to stand trial; civil proceedings must be commenced or the defendant released. Jackson v. Indiana, 406 US 715.

The contributions and limitations of psychiatric testimony. Fosdal, 1977 WBB 4.

971.15 Mental responsibility of defendant. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

(2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

It is not a violation of due process to put the burden of the affirmative defense of mental disease or defect on the defendant. State v. Hebard, 50 W (2d) 408, 184 NW (2d) 156.

Psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 W (2d) 89, 187 NW (2d) 784.

The state does not have to produce evidence contradicting an insanity defense. The burden is on the defendant. Gibson v. State, 55 W (2d) 110, 197 NW (2d) 813.

A voluntarily drugged condition is not a form of insanity which can constitute a mental defect or a disease. Medical testimony can hardly be used both on the issue of guilt to prove lack of intent and also to prove insanity. Gibson v. State, 55 W (2d) 110, 197 NW (2d) 813.

The legislature, in enacting this section, the ALI Institute definition of insanity, deliberately and positively excluded "antisocial conduct" from the statutory definition of "mental disease or defect." Simpson v. State, 62 W (2d) 605, 215 NW (2d) 435.

The jury was not obliged to accept the testimony of the 2 medical witnesses, although the state did not present medical testimony, because it was their responsibility to determine the weight and credibility of the medical testimony. Pautz v. State, 64 W (2d) 469, 219 NW (2d) 327.

The power of the psychiatric excuse. Halleck, 53 MLR 229.

Evidence of diminished capacity inadmissible to show lack of intent. 1976 WLR 623.

971.16 Examination of defendant. (1) Whenever the defendant has entered a plea of not guilty by reason of mental disease or defect or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, the court may appoint at least one physician but not more than 3 to examine the defendant and to testify at the trial. The compensation of such physicians shall be fixed by the court and paid by the county upon the order of the court as part of the costs of the action. The receipt by any physician summoned under this section of any other compensation than that so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation, is unlawful and punishable as contempt of court. The fact that such physician has been appointed by the court shall be made known to the jury and such physician shall be subject to cross-examination by both parties.

(2) Not less than 10 days before trial, or such other time as the court directs, any physician appointed pursuant to sub. (1) shall file a report of his examination of the defendant with the judge, who shall cause copies to be transmitted to the district attorney and to counsel for the defendant. The contents of the report shall be confidential until the physician has testified or at the completion of the trial. The report shall contain an opinion regarding the ability of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct with the requirements of law at the time of the commission of the criminal offense charged.

(3) Whenever the defendant wishes to be examined by a physician or other expert of his own choice, the examiner shall be permitted to have reasonable access to the defendant for the purposes of examination. No testimony regarding the mental condition of the defendant shall be received from a physician or expert witness summoned by the defendant unless not less than 3 days before trial a report of the examination has been transmitted to the district attorney and unless the prosecution has been afforded an opportunity to examine and observe the defendant if such opportunity has been seasonably demanded. The state may summon a physician or other expert to testify, but such witness shall not give testimony unless not less than 3 days before trial a written report of his examination of the defendant has been transmitted to counsel for the defendant.

(4) When a physician or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of

the defendant at the time of the commission of the offense charged, and his opinion as to the ability of the defendant to appreciate the wrongfulness of his conduct or to conform to the requirements of law. He shall be permitted to make an explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

(5) Nothing in this section shall require the attendance at the trial of any physician or other expert witness for any purpose other than the giving of his testimony.

Denial of defendant's motion for a directed verdict after defendant's sanity witnesses had testified and the state had rested, and then allowing 3 witnesses appointed by the court to testify, was not an abuse of discretion. State v. Bergenthal, 47 W (2d) 668, 178 NW (2d) 16.

The rules stated in the Bergenthal case apply where the trial is to the court. Lewis v. State, 57 W (2d) 469, 204 NW (2d) 527.

It is not error to allow a psychiatrist to express an opinion that no psychiatrist could form an opinion as to defendant's legal sanity because of unknown variables. Kemp v. State, 61 W (2d) 125, 211 NW (2d) 793.

"Mental condition" within meaning of (3) refers to the defense of mental disease or defect, not to an intoxication defense. Loveday v. State, 74 W (2d) 503, 247 NW (2d) 116.

971.17 Legal effect of finding of not guilty because of mental disease or defect. (1) When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.

(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.20 (16), except that the reexamination shall be before the committing court and notice shall be given to the district attorney. The application may be made by the defendant or the department. If the court is satisfied that the defendant may be safely discharged or released without danger to himself or herself or to others, it shall order the discharge of the defendant or order his or her release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him or her to the custody of the department.

(3) If, within 5 years of the conditional release of a committed person, the court determines after a hearing that the conditions of release have not been fulfilled and that the safety of such person or the safety of others requires that his conditional release be revoked, the court shall forthwith order him recommitted to the department, subject to discharge or release only in accordance with sub. (2).

(4) When the maximum period for which a defendant could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged subject to the right of the department to proceed against the defendant under ch. 51. If the department does not so proceed, the court may order such proceeding.

History: 1975 c. 430; 1977 c. 353; 1977 c. 428 s. 115.

Automatic commitment without a hearing to determine mental state and need for commitment under (1), violates the equal protection and due process clauses of the U.S. Constitution. Determination of present mental illness shall be made in all prosecutions pending or not instituted. State ex rel. Kovach v. Schubert, 64 W (2d) 612, 219 NW (2d) 341.

Under (2), the judge, not the psychiatrist, has been selected by the legislature as the officer of the state who must be "satisfied" that the release can be accomplished without danger to the defendant or to others. If the conclusion he reaches is a reasonable one on the basis of the facts and the circumstances, this court will affirm the decision. State v. Cook, 66 W (2d) 25, 224 NW (2d) 194.

Defendant is entitled to jury trial under (2); jury's verdict should either recommit defendant or grant release, with or without conditions established by trial judge. State ex rel. Gebarski v. Milw. County Cir. Ct. 80 W (2d) 489, 259 NW (2d) 531.

Automatic commitment of a defendant found not guilty by reason of insanity. 1974 WLR 1203.

971.175 Sequential order of proof. When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect, there shall be a separation of the issues with a sequential order of proof before the same jury in a continuous trial. The guilt issue shall be heard first and then the issue of the defendant's mental responsibility. The jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. This section does not apply to cases tried before the court without a jury.

A bifurcated trial is constitutional. Evidence as to mental condition is inadmissible during the guilt phase of the trial. State v. Hebard, 50 W (2d) 408, 184 NW (2d) 156.

In a bifurcated trial no evidence as to mental capacity may be introduced during the guilt phase of the trial, even as to the question of intent in a murder case. Sprague v. State, 52 W (2d) 89, 187 NW (2d) 784.

971.18 Inadmissibility of statements for purposes of examination. A statement made by a person subjected to psychiatric examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition.

971.19 Place of trial. (1) Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided.

(2) Where 2 or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occurred.

(3) Where an offense is committed on or within one-fourth of a mile of the boundary of 2 or more counties, the defendant may be tried in any of such counties.

(4) If a crime is committed in, on or against any vehicle passing through or within this state, and it cannot readily be determined in which county the crime was committed, the defendant may be tried in any county through which such vehicle has passed or in the county where his travel commenced or terminated.

(5) If the act causing death is in one county and the death ensues in another, the defendant may be tried in either county. If neither location can be determined, the defendant may be tried in the county where the body is found.

(6) If an offense is commenced outside the state and is consummated within the state, the defendant may be tried in the county where the offense was consummated.

(7) If a crime is committed on boundary waters at a place where 2 or more counties have common jurisdiction under s. 2.03 or 2.04 or under any other law, the prosecution may be in either county. The county whose process against the offender is first served shall be conclusively presumed to be the county in which the crime was committed.

Where failure to file registration form and act of soliciting contributions were elements of the offense, venue was proper in either of the 2 counties under (2). Blenski v. State, 73 W (2d) 685, 245 NW (2d) 906.

971.20 Substitution of judge. (1) The defendant or the defendant's attorney may file with the clerk a written request for a substitution of a new judge for the judge assigned to the trial of that case. The request shall be signed by the defendant or the defendant's attorney personally and shall be made before making any motion or before arraignment. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action.

(2) Upon the filing of the request in proper form and within the proper time the judge named in the request has no authority to act further in the case except to conduct the initial appearance, accept pleas of not guilty, and set bail. Except as provided in subs. (7) and (8), no more than one judge may be substituted in any action.

(3) In addition to the procedure under sub. (1), a request for the substitution of a judge may also be made by the defendant at the preliminary examination except that the request must be filed at the initial appearance or at least 5 days before the preliminary examination unless the court otherwise permits.

(4) When a judge is substituted under this section, the clerk of circuit court shall request assignment of another judge under s. 751.03.

(5) The request in sub. (1) may be in the following form:

STATE OF WISCONSIN,
..... County,
..... Court
State of Wisconsin
vs.
.....(Defendant)

Pursuant to s. 971.20 the defendant requests a substitution for the Hon. ..... as judge in the above entitled action.

Dated ....

.....(Signed by defendant personally)

(6) Upon the filing of an agreement signed by the defendant in a criminal action or proceeding, by the prosecuting attorney, by the original judge for which a substitution of a new judge has been made, and by the new judge, the criminal action or proceeding and pertinent records shall be transferred back to the original judge.

(7) If the judge who heard the preliminary examination is the same judge who is assigned to the trial of that case, the defendant or the defendant's attorney may file a reuqest under sub. (1) within 7 days after the preliminary examination or at the time of the arraignment, whichever occurs first, and still retain the right for one additional request under sub. (1).

(8) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order in a manner such that further proceedings in the trial court are necessary, the defendant or the defendant's attorney may file a request under sub. (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

History: 1971 c. 46; 1975 c. 149; 1977 c. 135; 1977 c. 187 s. 135; 1977 c. 449.

Judicial Council Note, 1977: Section 971.20 has been changed to improve imprecise language and to make clear that a judge in a criminal matter against whom a request for substitution has been made can, however, conduct an initial appearance, accept pleas of not guilty, and set bail.

A new provision has been added to allow the parties to a criminal action or proceeding, the prosecuting attorney, and the original and the new judge to agree to have the matter referred back to the original judge. This will aid the administration of justice in those cases where it is advantageous for everyone concerned to have the original judge take back the matter. [Bill 74-S]

Absent a showing of actual prejudice, entitlement to a change of judge could not be predicated on defendant's assertion that it is inherently prejudicial to permit the same judge to make a new determination on substantially the same facts, where he might be called upon to reverse his own prior decision. Krueger v. State, 53 W (2d) 345, 192 NW (2d) 880.

In multi-judge criminal courts with a calendaring system the arraignment is not completed until confirmation of the plea of not guilty before the judge to whom the case is assigned for trial when he sets the date for trial. Baldwin v. State, 62 W (2d) 521, 215 NW (2d) 541.

Defendant did not sustain his contention he can exercise at any time before trial a constitutional right, independent of statute, to command a factual hearing on the prejudice of a trial judge, since the statutory right for the substitution of the judge was available but unused. State v. Bell, 62 W (2d) 534, 215 NW (2d) 535.

The fact that the defendant appeared before the same judge on prior occasions did not in itself establish prejudice. Sprang v. State, 63 W (2d) 679, 218 NW (2d) 304.

Defendant's contention that the trial court's examination was inadequate prior to its granting of her request for a substitution of judges is rejected as a ground for withdrawal of the guilty plea not only where defendant both orally and in writing requested the substitution but where nothing in the record indicates any connection between granting the request for substitution of judge and the decision to plead guilty. State v. Jackson, 69 W (2d) 266, 230 NW (2d) 832.

Defendant who was charged in state court with obstructing an officer, endangering officer's safety and possession of marijuana, and who apparently waived right to challenge judge in state court, was not entitled to removal to federal court on theory that state judge to which his case was assigned was racially prejudiced and pro-police and that removal was required in order to protect rights to fair trial. Kennedy v. State of Wisconsin, 373 F Supp. 519.

971.21 Eligibility of judge to conduct trial. The judge who conducts the preliminary examination shall not conduct further proceedings unless the defendant and the district attorney consent on the record.

971.22 Change of place of trial. (1) The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause.

(2) The motion shall be in writing and supported by affidavit which shall state evidentiary facts showing the nature of the prejudice alleged. The district attorney may file counter affidavits.

(3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. Only one change may be granted under this subsection. The judge who orders the change in the place of trial shall preside at the trial. Preliminary matters prior to trial may be conducted in either county at the discretion of the court. The judge shall determine where the defendant, if he is in custody, shall be held and where the record shall be kept.

Relevant factors as to necessity of a change of venue discussed. State v. Hebard, 50 W (2d) 408, 184 NW (2d) 156; Tucker v. State, 56 W (2d) 728, 202 NW (2d) 897.

Rules for determining whether community prejudice exists discussed. Thomas v. State, 53 W (2d) 483, 192 NW (2d) 864.

While actual prejudice need not be shown, there must be a showing of a reasonable probability of prejudice inherent in the situation. Gibson v. State, 55 W (2d) 110, 197 NW (2d) 813.

The timing, specificity, inflammatory nature and degree of permeation of publicity is extremely important in determining the likelihood of prejudice in the community. State ex rel. Hussong v. Froelich, 62 W (2d) 577, 215 NW (2d) 390.

Where news stories concerning the crime were accurate, informational articles of a nature which would not cause prejudice and where 4 months elapsed between publication of the news stories and trial, it tended to indicate little or no prejudice against defendant. Jones v. State, 66 W (2d) 105, 223 NW (2d) 889.

There was no abuse of discretion in this prosecution for 1st-degree murder in not changing the venue where the transcript of the hearing on the issuance of arrest warrant, the preliminary examination, and other hearings were closed to public and press; the police and prosecutor refused to divulge any facts to public and press; and press reports were generally free from the details of incriminating evidence, straightforward and not incendiary. State v. Dean, 67 W (2d) 513, 227 NW (2d) 712.

Only defendant may waive right to venue where the crime was committed. State v. Mendoza, 80 W (2d) 122, 258 NW (2d) 260.

971.23 Discovery and inspection. (1) DEFENDANT'S STATEMENTS. Upon demand, the district attorney shall permit the defendant within a reasonable time before trial to inspect and copy or photograph any written or recorded statement concerning the alleged crime made by the defendant which is within the possession, custody or control of the state including the testimony of the defendant in an s. 968.26 proceeding or before a grand jury. Upon demand, the district attorney shall furnish the defendant with a written summary of all oral statements of the defendant which he plans to use in the course of the trial. The names of witnesses to the written and oral statements which the state plans to use in the course of the trial shall also be furnished.

(2) PRIOR CRIMINAL RECORD. Upon demand prior to trial, the district attorney shall furnish the defendant a copy of his criminal record which is within the possession, custody or control of the state.

(3) LIST OF WITNESSES. (a) A defendant may, not less than 15 days nor more than 30 days before trial, serve upon the district attorney an offer in writing to furnish the state a list of all witnesses the defendant intends to call at the trial, whereupon within 5 days after the receipt of such offer, the district attorney shall furnish the defendant a list of all witnesses and their addresses whom he intends to call at the trial. Within 5 days after the district attorney furnishes such list, the defendant shall furnish the district attorney a list of all witnesses and their addresses whom the defendant intends to call at the trial. This section shall not apply to rebuttal witnesses or those called for impeachment only.

(b) No comment or instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such comment or instruction is the fact the name of the witness appears upon a list furnished pursuant to this section.

(4) INSPECTION OF PHYSICAL EVIDENCE. On motion of a party subject to s. 971.31 (5), all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence. Thereupon, any party shall be permitted to inspect or copy such physical evidence in the presence of a person designated by the court. The order shall specify the time, place and manner of making the inspection, copies or photographs and may prescribe such terms and conditions as are just.

(5) SCIENTIFIC TESTING. On motion of a party subject to s. 971.31 (5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes. The court may also order the production of reports or results of any scientific tests or experiments made by any party relating to evidence intended to be introduced at the trial.

(6) PROTECTIVE ORDER. Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses be denied, restricted or deferred, or make other appropriate orders. If the district attorney or defense counsel certifies that to list a witness may subject the witness or others to physical or economic harm or coercion, the court may order that the deposition of the witness be taken pursuant to s. 967.04 (2) to (6). The name of the witness need not be divulged prior to the taking of such deposition. If the witness becomes unavailable or changes his testimony, the deposition shall be admissible at trial as substantive evidence.

(7) CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production hereunder, he shall promptly notify the other party of the existence of the additional material or names. The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

(8) NOTICE OF ALIBI. (a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 15 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known. If at the close of the state's case the defendant withdraws the alibi or if at the close of the defendant's case the defendant does not call some or any of the alibi witnesses, the state shall not comment on the defendant's withdrawal or on the failure to call some or any of the alibi witnesses. The state shall not call any alibi witnesses not called by the defendant for the purpose of impeaching the defendant's credibility with regard to the alibi notice. Nothing in this section may prohibit the state from calling said alibi witnesses for any other purpose.

(b) In default of such notice, no evidence of the alibi shall be received unless the court, for cause, orders otherwise.

(c) The court may enlarge the time for filing a notice of alibi as provided in par. (a) for cause.

(d) Within 10 days after receipt of the notice of alibi, or such other time as the court orders, the district attorney shall furnish the defendant notice in writing of the names and addresses, if known, of any witnesses whom the state proposes to offer in rebuttal to discredit the defendant's alibi. In default of such notice, no rebuttal evidence on the alibi issue shall be received unless the court, for cause, orders otherwise.

History: 1973 c. 196; 1975 c. 378, 421.

Inadequate preparation for trial which resulted in a district attorney's failure to disclose all scientific reports does not constitute good cause for the failure if the defense is misled, but this is subject to the harmless error rule. Wold v. State, 57 W (2d) 344, 204 NW (2d) 482.

When a prosecutor submitted a list of 97 witnesses he intended to call the court should have required him to be more specific as to those he really intended to call. Irby v. State, 60 W (2d) 311, 210 NW (2d) 755.

The last sentence of (3) (a) providing "This section shall not apply to rebuttal witnesses or those called for impeachment only." is stricken as unconstitutional. Sub. (8), stats. 1973, is constitutional because after notice of alibi is given the state would have a duty to submit a list of rebuttal witnesses under (3) (a). This satisfies the due process requirement of reciprocity. Allison v. State, 62 W (2d) 14, 214 NW (2d) 437.

Retroactive effect of ruling in Allison as to (3) (a) denied where defendant not prejudiced by operation of alibi statute. Rohl v. State, 65 W (2d) 683, 223 NW (2d) 567.

Under both the statutory discovery provisions of this section and the constitutional duty of the state to disclose to a criminal defendant evidence exculpatory in nature, there is no requirement to provide exculpatory evidence which is not within the exclusive possession of the state and does not surprise or prejudice the defendant. State v. Calhoun, 67 W (2d) 204, 226 NW (2d) 504.

The calling of a rebuttal witness not included in the state's witness list, as allowed by (3) (a), was not unconstitutional. Although substantial evidence indicates that the state had subpoenaed its "rebuttal" witness at least 2 weeks before he was called to testify and deliberately held him back for "dramatic" effect, no objection or motion to suppress was made on

the proper ground that the witness was not a bona fide rebuttal witness hence objection to the witness' testimony was waived. Caccitolo v. State, 69 W (2d) 102, 230 NW (2d) 139.

Where the state calls a witness not included in its list of witnesses exchanged under (3), the preferable procedure is not to strike the witness but to allow a defendant, who makes a timely showing of surprise and prejudice, a continuance sufficient to interview the witness. Kutchera v. State, 69 W (2d) 534, 230 NW (2d) 750.

The written summary of all oral statements made by defendant which the state intends to introduce at trial and which must be provided to defendant under (1), upon request is not limited to statements to police; hence, incriminating statements made by defendant to 2 witnesses were within the scope of the disclosure statute. Kutchera v. State, 69 W (2d) 534, 230 NW (2d) 750.

Where defendant relies solely on defense of alibi and on day of trial complaining witness changes mind as to date of occurrence, request for continuance based on surprise was properly denied because defendant failed to show prejudicial effect of unexpected testimony. See note to 971.10, citing Angus v. State, 76 W (2d) 191, 251 NW (2d) 28.

Generalized inspection of prosecution files by defense counsel prior to preliminary hearing is so inherently harmful to orderly administration of justice that trial court may not confer such right. Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 773.

Comparison of federal discovery and the ABA standards with the Wisconsin statute. 1971 WLR 614.

971.24 Statement of witnesses. (1) At the trial before a witness other than the defendant testifies, written or phonographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury. For cause, the court may order the production of such statements prior to trial.

(2) Either party may move for an in camera inspection by the court of the documents referred to in sub. (1) for the purpose of masking or deleting any material which is not relevant to the case being tried. The court shall mask or delete any irrelevant material.

When a party successfully moves under (2) to have material masked or deleted from a discovery document, the proper procedure to be pursued is to place it in a sealed envelope or container, if necessary, so that it may be preserved for the aid of the supreme court upon appellate review. State v. Van Ark, 62 W (2d) 155, 215 NW (2d) 41.

Under (1), statements do not include notes made by an enforcement officer at the time of his interrogation of a witness. Coleman v. State, 64 W (2d) 124, 218 NW (2d) 744.

Police officers' "memo books" and reports were within the rule requiring production of witness statements, since the books and reports were written by the officers, the reports signed by them, and both officers testified as to the incident preceding defendant's arrest. State v. Groh, 69 W (2d) 481, 230 NW (2d) 745.

All statements, whether possessed by direct-examining counsel or cross-examining counsel, must be produced; mere notes need not be produced. State v. Lenarchick, 74 W (2d) 425, 247 NW (2d) 80.

See note to 971.23, citing Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 769.

971.25 Disclosure of criminal record. (1) The district attorney shall disclose to the defendant, upon demand, the criminal record of a prosecution witness which is known to the district attorney.

(2) The defense attorney shall disclose to the district attorney, upon demand, the criminal record of a defense witness, other than the defendant, which is known to the defense attorney.

The prosecutor's duty under (1) does not ordinarily extend to discovery of criminal records from other jurisdictions. The prosecutor must make good-faith efforts to obtain such records from other jurisdictions specifically requested by the defense. Jones v. State, 69 W (2d) 337, 230 NW (2d) 677.

See note to 971.23, citing Matter of State ex rel. Lynch v. County Ct. 82 W (2d) 454, 262 NW (2d) 773.

971.26 Formal defects. No indictment, information, complaint or warrant 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 do not prejudice the defendant.

The fact that the information alleged the wrong date for the offense is not prejudicial where the complaint stated the correct date and there was no evidence defendant was misled. A charge of violation of 946.42 (2) (a) (c) is a technical defect of language in a case where both paragraphs applied. Burkhalter v. State, 52 W (2d) 413, 190 NW (2d) 502.

The failure to cite the correct statutory subsections violated in the information and certificate of conviction is immaterial where defendant cannot show he was misled. Craig v. State, 55 W (2d) 489, 198 NW (2d) 609.

Lack of prejudice to defendant, notwithstanding technical defects in the information, is made patent by his counsel's concession that his client knew precisely what crime he was charged with having committed, and the absence in the record of any such claim asserted during the case, which was vigorously tried. Clark v. State, 62 W (2d) 194, 214 NW (2d) 450.

Failure to allege lack of consent was not fatal jurisdictional defect of information charging burglary. Schleiss v. State, 71 W (2d) 733, 239 NW (2d) 68.

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

971.28 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.

971.29 Amending the charge. (1) A complaint or information may be amended at any time prior to arraignment without leave of the court.

(2) At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

(3) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby

rendered necessary and may proceed with or postpone the trial.

Where there was evidence which a jury could believe proved guilt, the trial court cannot sua sponte set aside the verdict, amend the information, and find defendant guilty on a lesser charge. State v. Helnik, 47 W (2d) 720, 177 NW (2d) 881.

The variance is not material where the court amended the charge against the defendant to charge a lesser included crime. Moore v. State, 55 W (2d) 1, 197 NW (2d) 820.

Sub. (2), in regard to amendments after verdict, applies only to technical variances in the complaint, not material to the merits of the action. It may not be used to substitute a new charge. State v. Duda, 60 W (2d) 431, 210 NW (2d) 763.

The refusal of a proposed amendment of an information has no effect on the original information. An amendment to charge a violation of a substantive section as well as a separate penalty section is not prejudicial to a defendant. Wagner v. State, 60 W (2d) 722, 211 NW (2d) 449.

The trial court cannot after trial amend a charge of sexual intercourse with a child to one of contributing to the delinquency of a minor since the offenses require proof of different facts and defendant is entitled to notice of the charge against him. LaFond v. Quatsoe, 325 F Supp. 1010.

971.30 Motion defined. (1) "Motion" means an application for an order.

(2) Unless otherwise provided or ordered by the court, all motions shall be in writing and shall state with particularity the grounds therefor and the order or relief sought.

971.31 Motions before trial. (1) Any motion which is capable of determination without the trial of the general issue may be made before trial.

(2) Except as provided in sub. (5), defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, 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 shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

(3) The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

(4) Except as provided in sub. (3), a motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at the trial. All issues of fact arising out of such motion shall be tried by the court without a jury.

(5) (a) Motions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action or 10 days after arraignment in a felony action unless the court otherwise permits.

(b) In felony actions, motions to suppress evidence or motions under ss. 971.23 to 971.25 or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination and not until an information has been filed.

(c) In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived.

(6) If the court grants a motion to dismiss based upon 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 not more than 72 hours pending issuance of a new summons or warrant or the filing of a new indictment, information or complaint.

(7) If the motion to dismiss 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 proceeding shall be dismissed or reversed for any error or mistake where the case and the identity of the defendant may be readily understood by the court; and the court may order an amendment curing such defects.

(9) A motion required to be served on a defendant may be served upon his attorney of record.

(10) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty.

(11) In actions under s. 940.225, evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

History: 1975 c. 184.

Where defendant made a pro se motion before trial to suppress evidence of identification at a lineup, but trial counsel refused to pursue the motion for strategic reasons, this amounts to a waiver of the motion. State v. McDonald, 50 W (2d) 534, 184 NW (2d) 886.

A claim of illegal arrest for lack of probable cause must be raised by motion before trial. Lampkins v. State, 51 W (2d) 564, 187 NW (2d) 164.

The waiver provision in sub. (2) is constitutional. Day v. State, 52 W (2d) 122, 187 NW (2d) 790.

A defendant is not required to make a motion to withdraw his plea to preserve his right to a review of an alleged error of refusal to suppress evidence State v. Meier, 60 W (2d) 452, 210 NW (2d) 685.

Motion to suppress statements on the ground they were products of an allegedly improper arrest, was timely, notwithstanding failure to assert that challenge prior to appearance in court at arraignment, since it was made after information was filed and prior to trial. Rinehart v. State, 63 W (2d) 760, 218 NW (2d) 323.

Request for Goodchild hearing after direct testimony is concluded is not timely under (2). Coleman v. State, 64 W (2d) 124, 218 NW (2d) 744.

The rule in (2) does not apply to confessions, because (2) is qualified by (3) and (4). Upchurch v. State, 64 W (2d) 553, 219 NW (2d) 363.

Challenge to the search of his person cannot be raised for the first time on appeal. Madison v. State, 64 W (2d) 564, 219 NW (2d) 259.

Defendant's right to testify at Goodchild hearing may be curtailed only for the most compelling reasons. Franklin v. State, 74 W (2d) 717, 247 NW (2d) 721.

971.32 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.

971.33 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.

971.34 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.

971.35 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.

971.36 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;

(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 no contest, 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.