

CHAPTER 975

SEX CRIMES LAW

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975.01 Mandatory commitment for presentence examination. If a person is convicted under s. 940.225 (1) to (3) or under s. 939.32 for attempting to violate s. 940.225 (1) to (3), the court shall commit the person to the department of health and social services for a presentence social, physical and mental examination. The court and all public officials shall make available to the department upon its request all data in their possession in respect to the case.

History: 1975 c. 184 s. 13; 1975 c. 421.

A convicted defendant cannot challenge the conviction because he was committed to the sex deviate center thereafter without notice or hearing. *Cross v. State*, 45 W (2d) 593, 173 NW (2d) 589.

Conclusion of experts that defendant was a sex deviate may be based on the fact of conviction and the record where defendant refused to talk to them. *Howland v. State*, 51 W (2d) 162, 186 NW (2d) 319.

Where the department refused to accept defendant for examination because of lack of facilities, the state could have the examination conducted by the Milwaukee probation department and send reports to the H&SS department which then recommended specialized treatment. The failure to conduct a physical examination was harmless error where 2 psychiatrists failed to report any physical aberration. *State v. Torpy*, 52 W (2d) 101, 187 NW (2d) 858.

975.02 Discretionary commitment. If a person is convicted of any sex crime other than those specified, the court may commit him to the department for such a presentence examination. The court and all public officials shall make available to the department upon its request all data in their possession in respect to the case. "Sex crime" as used in this section includes any crime except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime; and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue.

History: 1973 c. 99, 243.

Where defendant pleaded guilty to contributing to the delinquency of a minor the court could find that the defendant was motivated by desire for sexual excitement on the hearsay testimony of an officer since defendant did not object and no question was raised as to the accuracy of the testimony. *State v. Torpy*, 52 W (2d) 101, 187 NW (2d) 858.

975.03 Transportation. When the court commits a person to the department as provided above for presentence examination, the court shall order him conveyed by the proper county authorities at the sole expense of the county, to some place of detention or examination approved or established by the department.

975.04 Report of examination. (1) Upon completion of the examination, but not later than 60 days after the date of the commitment order, a report of the results of the examination and the recommendations of the department shall be sent to the court.

(2) Commitments to the department under this chapter for presentence examination are terminated when the court orders the defendant returned to court by the proper county authorities and the department gives custody of him to such authorities or when following receipt by the court of the department's report and recommendations, he is brought before the court for any reason; or when during the presentence examination he absconds and the court issues a warrant for his arrest.

The criteria of the department in deciding whether to recommend specialized treatment need not be set forth in the statute. *State v. Torpy*, 52 W (2d) 101, 187 NW (2d) 858.

975.05 Sentence imposed. If the department does not recommend specialized treatment for the defendant's mental and physical aberrations, the court shall sentence the defendant as provided by law.

History: 1975 c. 39, 199; 1977 c. 418.

It is proper to sentence under the criminal code where the department recommends treatment for causes other than for sexual psychopathology. *Nadolinski v. State*, 46 W (2d) 259, 174 NW (2d) 483.

975.06 Commitment to the department.

(1) (a) If the department recommends specialized treatment for the defendant's mental or physical aberrations, the court shall order a hearing on the issue of the need for specialized treatment unless such hearing is expressly waived by the defendant. The hearing shall be conducted by the court or as provided in par.

(b). The court may consider any department rule established in accordance with ch. 227 establishing criteria for recommending specialized treatment. The defendant shall be afforded the opportunity to appear with counsel; process to compel the attendance of witnesses and the production of evidence; and a physician, or clinical psychologist of defendant's choosing to examine the defendant and testify in defendant's behalf. If unable to provide counsel or expert witness, the court shall appoint such to represent or examine the defendant.

(b) The hearing shall be to a jury, unless the defendant waives a jury. The number of jurors shall be determined under s. 756.096 (3) (b). The procedure shall be substantially like a jury trial in a civil action. The judge may instruct the jurors in the law. No verdict is valid or received unless agreed to and signed by five-sixths of the jurors. At the time of ordering a jury to be summoned, the court shall fix the date of hearing, which date shall be not less than 30 days nor more than 40 days after the demand for the jury was made. The court shall submit to the jury the following form of verdict:

STATE OF WISCONSIN

.... County

Members of the Jury:

Do you find from the evidence that the defendant (Insert name) is in need of specialized treatment? Answer "Yes" or "No".

(2) If, upon completion of the hearing as required in sub. (1), it is found that the defendant is in need of specialized treatment the court shall commit the defendant to the department. The court may stay execution of the commitment and place the defendant on probation under ch. 973 with a condition of probation that the defendant receive treatment in a manner to be prescribed by the court. If the defendant is not placed on probation, the court shall order the defendant conveyed by the proper county authorities, at county expense, to the sex crimes law facility designated by the department.

(3) Probation under sub. (2) shall be construed as a commitment to the department for the purposes of continuation of control as provided in this chapter.

(4) If, upon the completion of the hearing required in sub. (1), it is found that the defendant is not in need of such specialized treatment the court shall sentence the defendant as provided in ch. 973.

(5) If records of the department are required for any hearing under this chapter, they shall be made available upon a subpoena directed to the coordinator of the special review board of the department, who may respond in person or designate an agent to produce the records of the department.

(6) Persons committed under this section who are also encumbered with other sentences, whether concurrent with or consecutive to the commitment, shall be received or remain at the sex crimes facility designated by the department. Such facilities may be regarded as state prisons for the purpose of beginning the other sentences, crediting time served on them, and computing parole eligibility dates.

History: 1973 c. 44; 1975 c. 155, 199, 200; 1977 c. 318; 1977 c. 447 s. 210.

Legislative Council Note, 1975: This bill inserts provisions for a jury trial in the procedures to commit (s. 975.06) and recommit (s. 975.14) convicted defendants for special treatment under the Sex Crimes Law. In *State ex rel. Farrell v. Stovall* (1973), 59 Wis. 2d 148, the Wisconsin Supreme Court ruled, on equal protection grounds, that hearings on commitment and recommitment under the Sex Crimes Law must give the defendant the same rights as a proceeding under Ch. 51 (commitment for mental illness); i.e., a hearing on the issue to a jury. This bill provides for a 12-person jury, but allows the defendant to request a 6-person jury or waive a jury. It also requires that jury verdicts favoring special treatment must be agreed to by five-sixths of the jurors. The five-sixths requirement is drawn from ch. 51, and is also the standard for civil actions (see s. 270.25 [805.09 (2)]). [Bill 259-A]

A commitment to the department does not constitute cruel and unusual punishment. *Howland v. State*, 51 W (2d) 162, 186 NW (2d) 319.

The defendant is entitled to a jury determination on the question of his sexual deviancy at his initial commitment and any recommitment under 975.14. The procedure is substantially like a jury trial in a civil action. Some distinctions as to judicial review and release are still permitted. *State ex rel. Farrell v. Stovall*, 59 W (2d) 148, 207 NW (2d) 809.

A defendant, convicted of rape, committed while out on bail awaiting a new trial on a prior rape charge, who was placed on probation and ordered to receive out-patient treatment as a sex deviate upon the department's recommendation, did not, after retrial and conviction of the first offense and change in the department's report, establish trial court abuse of discretion in committing him to the department. *Cousins v. State*, 62 W (2d) 217, 214 NW (2d) 315.

See note to art. I, sec. 8, citing *Hill v. Burke*, 422 F (2d) 1195.

975.07 The effect of appeal from a judgment of conviction. (1) The right of a defendant to appeal from the judgment of conviction is not affected by this chapter.

(2) If a person who has been convicted and committed to the department appeals from a conviction, the execution of the commitment to the department shall not be stayed by the appeal except as provided in sub. (3).

(3) If the committing court is of the opinion that the appeal was taken in good faith and that

the question raised merits review by the appellate court, or when there has been filed with the court a certificate that a judge of an appellate court is of the opinion that questions have been raised that merit review, the judge of the court in which the person was convicted, or in the case of his incapacity to act, the judge by whom the certificate was filed, may direct that such person be released on bond under such conditions as, in the judge's opinion, will insure his submission to the control of the department at the proper time if it is determined on the appeal that the department is entitled to custody.

975.08 Notice of commitments; treatment, transfer, use of other facilities. (1) If a court commits a person to the department under s. 975.06 it shall at once notify the department of such action in writing.

(2) The department shall then arrange for his treatment in the institution best suited in its judgment to care for him. It may transfer him to or from any institution to provide for him according to his needs and to protect the public. The department may irrespective of his consent require participation by him in vocational, physical, educational and correctional training and activities; may require such modes of life and conduct as seem best adapted to fit him for return to full liberty without danger to the public; and may make use of other methods of treatment and any treatment conducive to the correction of the person and to the prevention of future violations of law by him.

(3) The department may make use of law enforcement, detention, parole, medical, psychiatric, psychological, educational, correctional, segregative and other resources, institutions and agencies, public or private, within the state. The department may enter into agreements with public officials for separate care and special treatment (in existing institutions) of persons subject to the control of the department under this chapter. Nothing herein contained shall give the department control over existing institutions or agencies not already under its control, or give it power to make use of any private agency or institution without its consent.

(4) Placement of a person by the department in any institution or agency, not operated by the department, or his discharge by such institution or agency, shall not terminate the control of the department over him. No person placed in such institution or agency may be released therefrom except to the department or after approval of such release by the department.

975.09 Periodic examination. The department shall make periodic examinations of all

persons within its control under s. 975.06 for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep written records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the committing court for an order of discharge, and the court shall discharge him unless it appears in accordance with s. 975.13 that there is necessity for further control.

See notes to Art. I, sec. 1 and Art. I, sec. 8, citing State ex rel. Terry v. Schubert, 74 W (2d) 487, 247 NW (2d) 109.

975.10 Parole. Any person committed as provided in this chapter may be paroled if it appears to the satisfaction of the department after recommendation by a special review board, appointed by the department, a majority of whose members shall not be connected with the department, that he is capable of making an acceptable adjustment in society.

The special review board has no power to recommend forfeiture of good time of a prisoner. State ex rel. Farrell v. Schubert, 52 W (2d) 351, 190 NW (2d) 529.

The special review board. Schmidt, 1973 WLR 172.

975.11 Duration of control. The department shall keep every person committed to it under s. 975.06 under its control and shall retain him, subject to the limitations of s. 975.12 under supervision and control, so long as in its judgment such control is necessary for the protection of the public. The department shall discharge any such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public, but no person convicted of a felony shall, without the written approval of the committing court, be discharged prior to 2 years after the date of his commitment.

975.12 Termination of control. (1) Every person committed to the department under this chapter who has not been discharged as provided in this chapter shall be discharged at the expiration of one year or the expiration of the maximum term prescribed by the law for the offense for which he or she was committed subject to sub. (2) and the credit provisions of s. 973.155, whichever period of time is greater, unless the department shall have acted under s.

975.13 to continue him or her subject to its control. For the purpose of this subsection, sentence shall begin at noon of the day of the commitment by the court to the department.

(2) All commitments under s. 975.06 for offenses committed after July 1, 1970, shall be subject to ss. 53.11 and 53.12. If the department is of the opinion that release on parole pursuant to s. 53.11 (7) (a) would be dangerous to the public, it shall either make an order directing that the person remain subject to its control or make an order suspending the provisions of s. 53.11 (7) (a) and in either case shall make application to the committing court for a review of that order proceeding as provided in this chapter.

History: 1977 c. 353.

See note to Art. I, sec. 1, citing *Milewski v. State*, 74 W (2d) 681, 248 NW (2d) 70.

975.13 Continuance of control; order and application for review by the committing court. If the department is of the opinion that discharge of a person from its control at the time provided above would be dangerous to the public for reasons set forth in s. 975.14, it shall make an order directing that he remain subject to its control beyond that period; and shall make application to the committing court for a review of that order at least 90 days before the time of discharge stated.

To make a finding that it would be dangerous to release defendant does not require that he may be violent; a threat of moral or psychological harm to others is sufficient. *State v. Torpy*, 52 W (2d) 101, 187 NW (2d) 858.

This section does not mean that the court must review the case 90 days before the deadline. *State v. Smith*, 55 W (2d) 451, 198 NW (2d) 588.

If application for review of recommitment is timely made, the court has jurisdiction to review the order after the 90 days have expired. *State v. Dudley*, 59 W (2d) 175, 207 NW (2d) 822.

975.14 Action of committing court upon application for review; reasons for continuance of control by the department. (1) If the department applies to the committing court for the review of an order as provided in s. 975.13 the court shall notify the person whose liberty is involved, and, if the person is not sui juris, the person's parent or guardian as practicable, of the application, and shall afford the person opportunity to appear in court with counsel and of process to compel the attendance of witnesses and the production of evidence. The person may have a physician or clinical psychologist of the person's choosing examine the person and the medical records in the institution to which confined or at some suitable place designated by the department. If unable to provide counsel, the court shall appoint counsel to represent the person. Section 975.06 (1) shall govern the procedure of the hearing.

(2) If, after a hearing, it is found that discharge from the control of the department of the person to whom the order applies would be dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality the court shall confirm the order. If it is found that discharge from the control of the department would not be dangerous to the public for the causes stated, the court shall order that the person be discharged from the control of the department at the time stated in the original commitment.

History: 1975 c. 155, 199.

Revisor's Note, 1975: See Legislative Council Note, 1975, following 975.06. [Bill 259-A]

See note to 975.06, citing *State ex rel. Farrell v. Stovall*, 59 W (2d) 148, 207 NW (2d) 809.

975.15 Review by court of subsequent orders of the department. (1) When an order of the department is confirmed as provided in s. 975.14 the control of the department over the person shall continue, but unless he is previously discharged, the department shall within 5 years after the date of such confirmation make a new order and a new application for review thereof in accordance with this chapter, subject to s. 57.072. Such orders and applications may be repeated as often as in the opinion of the department it may be necessary for the protection of the public.

(2) Every person shall be discharged from the control of the department at the termination of the periods stated in sub. (1) unless the department has previously acted therein as required, and shall be discharged if the court fails to confirm the order as provided in s. 975.14.

(3) During any such period of extended control, but not oftener than semiannually, a person may apply to the court for a reexamination of his mental condition and the court shall fix a time for hearing the same. The proceeding shall be as provided in s. 51.20 (16).

History: 1975 c. 430 s. 80; 1977 c. 428 s. 115.

975.16 Appeal from judgment of committing court. (1) If, under this chapter the court affirms an order of the department, the person whose liberty is involved may appeal to the proper appellate court for a reversal or modification of the order. The appeal shall be taken as provided by law for appeals to said court from the judgment of an inferior court.

(2) At the hearing of an appeal the appellate court may base its judgment upon the record, or it may upon its own motion or at the request of either the appellant or the department refer the matter back for the taking of additional evidence.

(3) The appellate court may confirm the order of the lower court, or modify it, or reverse it and order the appellant to be discharged.

(4) Pending appeal the appellant shall remain under the control of the department.

975.17 Voluntary admission to diagnostic institutions; treatment. Any person believing himself to be afflicted by a physical or mental condition which may result in sexual action dangerous to the public may apply upon forms prescribed by the department for voluntary admission to some institution which provides diagnosis for such persons. If the application is approved and he is admitted by the department, he shall be given a complete physical and mental examination. If it appears upon the examination that he is afflicted by a physical or mental condition that may prove dangerous to the public, such fact shall be certified to him and to the

department. If he desires treatment he may apply for admission to an institution designated by the department and upon approval of his application, he may be received in the designated institution and shall there receive the treatment indicated by his condition. If he is able to defray all or a part of the cost of his care and treatment, he shall be required to do that. If he desires to leave the institution he shall give 5 days' written notice to the superintendent of the institution of his intention to leave. The department may provide outpatient treatment for him at his expense.

975.18 Establishment of regulations. The department may promulgate rules concerning parole, revocation of parole, supervision of parolees, and any other matters necessary for the administration of this chapter.