

CHAPTER 973

SENTENCING

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

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

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

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

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

The supreme court adopts Standard 2.3 (c) of the ABA Standards Relating to Appellate Review of Sentences,

thereby requiring the sentencing judge to state for the record in the presence of the defendant the reasons for selecting the particular sentence imposed or, if the sentencing judge deems it in the interest of the defendant not to state his reasons in the presence of the defendant, to prepare a statement for transmission to the reviewing court as part of the record. *McCleary v. State*, 49 W (2d) 263, 182 NW (2d) 512.

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

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

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

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

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

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

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

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

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

The rule of *Byrd* (65 W (2d) 415) is not applicable to confinement during nonworking hours imposed subsequent to conviction as a condition of a probation which is later revoked. *State v. Wills*, 69 W (2d) 489, 230 NW (2d) 827.

The trial court's modification and making concurrent of certain of defendant's sentences for burglary was proper on

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

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

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

Trial court exceeded jurisdiction by specifying conditions of incarceration. *State v. Gibbons*, 71 W (2d) 94, 237 NW (2d) 33.

Plea bargain agreements by law enforcement officials not to reveal relevant and pertinent information to sentencing judge are unenforceable as being against public policy. *Grant v. State*, 73 W (2d) 441, 243 NW (2d) 186.

Chronic offenses of theft by fraud by promising to marry several persons provide a rational basis for lengthy sentence. *Lambert v. State*, 73 W (2d) 590, 243 NW (2d) 524.

Sentencing judge does not deny due process by considering pending criminal charges in determining sentence. Scope of judicial inquiry prior to sentencing discussed. *Handel v. State*, 74 W (2d) 699, 247 NW (2d) 711.

See note to Art I, sec. 8, citing *Holmes v. State*, 76 W (2d) 259, 251 NW (2d) 56.

See note to Art. I, sec. 8, citing *Williams v. State*, 79 W (2d) 235, 255 NW (2d) 504.

Where consecutive sentences are imposed, pretrial incarceration due to indigency should be credited as time served on only one sentence. *Wilson v. State*, 82 W (2d) 657, 264 NW (2d) 234.

Courts may correct formal or clerical errors or an illegal sentence at any time. *Krueger v. State*, 86 W (2d) 435, 272 NW (2d) 847 (1979).

Trial court did not abuse discretion during resentencing where it refused to give defendant credit for time served on unrelated conviction which was voided. *State v. Allison*, 99 W (2d) 391, 298 NW (2d) 286 (Ct. App. 1980).

See note to 971.08, citing *State v. Johnson*, 105 W (2d) 657, 314 NW (2d) 897 (Ct. App. 1981).

Prosecutor is relieved from terms of plea agreement where it is judicially determined that defendant has materially breached its conditions. *State v. Rivest*, 106 W (2d) 406, 316 NW (2d) 395 (1982).

In fixing sentence within statutory limits, judge may consider defendant's false testimony observed by judge during trial. *United States v. Grayson*, 438 US 41 (1978).

Appellate sentence review. 1976 WLR 655.

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

(2) A person has successfully completed the sentence if the person has not been convicted of a

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

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

"Expunge" under this section means to strike or obliterate from the record all references to defendant's name and identity. 67 Atty. Gen. 301.

Circuit courts do not possess inherent powers to expunge or destroy conviction records. 70 Atty. Gen. 115.

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

History: 1973 c. 90.

See note to 939.60, citing *State ex rel. McDonald v. Douglas Cty. Cir. Ct.* 100 W (2d) 569, 302 NW (2d) 462 (1981).

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

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

History: 1971 c. 298.

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

973.05 Fines. (1) When a defendant is sentenced to pay a fine, the court may grant permission for the payment of the fine, of the penalty assessment imposed by s. 165.87, any applicable domestic abuse assessment imposed by s.

973.055, any applicable driver improvement surcharge imposed by s. 346.655, any applicable natural resources assessment imposed by s. 29.997 and any applicable natural resources restitution payment imposed by s. 29.998 to be made within a period not to exceed 60 days. If no such permission is embodied in the sentence, the fine, the penalty assessment, any applicable domestic abuse assessment, any applicable driver improvement surcharge, any applicable natural resources assessment and any applicable natural resources restitution payment shall be payable immediately.

(1m) If the court orders payment of restitution and a fine and related payments under s. 973.09 (1) (b), the court may authorize a payment period in excess of 60 days.

(2) When a defendant is sentenced to pay a fine and is also placed on probation, the court may make the payment of the fine, the penalty assessment, any applicable domestic abuse assessment, any applicable driver improvement surcharge, any applicable natural resources assessment and any applicable natural resources restitution payments a condition of probation. When the payments are made a condition of probation by the court, payments thereon shall be applied first to payment of the penalty assessment until paid in full, shall then be applied to payment of the driver improvement surcharge until paid in full, shall then be applied to payment of the domestic abuse assessment until paid in full, shall then be applied to payment of the natural resources assessment if applicable until paid in full, shall then be applied to payment of the natural resources restitution payment until paid in full and shall then be applied to payment of the fine.

(3) (a) In lieu of part or all of a fine imposed by a court, the court may stay the execution of part or all of the sentence and provide that the defendant perform community service work under pars. (b) and (c). The amount of the fine actually paid, if any, shall be used to determine any applicable assessment or surcharge under sub. (1). If the defendant fails to comply with the community service order, the court shall order the defendant brought before the court for imposition of sentence. If the defendant complies with the community service order, he or she has satisfied that portion of the sentence.

(b) The court may require that the defendant perform community service work for a public agency or a nonprofit charitable organization. The number of hours of work required may not exceed what would be reasonable considering the seriousness of the offense and any other offense which is read into the record at the time of conviction. An order may only apply if agreed

to by the defendant and the organization or agency. The court shall ensure that the defendant is provided a written statement of the terms of the community service order and that the community service order is monitored.

(c) Any organization or agency acting in good faith to which a defendant is assigned pursuant to an order under this subsection has immunity from any civil liability in excess of \$25,000 for acts or omissions by or impacting on the defendant.

History: 1977 c. 29; 1979 c. 34, 111; 1981 c. 20, 88, 352.

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

Trial courts are encouraged to use instalment method when dealing with indigent defenders; instalment period may exceed 60 days. Will v. State, 84 W (2d) 397, 267 NW (2d) 357 (1978).

Court cannot impose probation or order defendant to perform community work in lieu of imposing statutorily required minimum jail sentence. OAG 12-82.

973.055 Domestic abuse assessments.

(1) On or after May 1, 1980, if a court imposes a fine, the court shall determine whether the criminal conduct involved domestic abuse, as defined in s. 46.95 (1) (a). If the court makes the finding, it shall impose a domestic abuse assessment, in addition to the fine and penalty assessment, in an amount of 10% of the fine imposed. If multiple offenses are involved, the domestic abuse assessment shall be based on the total fine for all offenses which involved domestic abuse. If a fine is suspended, the domestic abuse assessment shall be reduced in proportion to the suspension.

(2) After the court determines the amount due, the clerk of the court shall collect and transmit the amount to the county treasurer as provided in s. 59.395 (5). The county treasurer shall then make payment to the state treasurer as provided in s. 59.20 (5) (b).

(3) All moneys collected from domestic abuse assessments shall be deposited by the state treasurer in s. 20.435 (2) (hh) and utilized in accordance with s. 46.95.

History: 1979 c. 111; 1979 c. 221 s. 2202 (20); 1979 c. 355; 1981 c. 20 s. 2202 (20) (s).

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

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

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

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

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

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

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

(3) If the court orders payment of restitution as a condition of probation, collection of costs shall be as provided under s. 973.09 (1g) and (1m).

History: Sup. Ct. Order, 67 W (2d) 784; 1979 c. 356; 1981 c. 352.

See note to 814.51, citing *State v. Foster*, 100 W (2d) 103, 301 NW (2d) 192 (1981).

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

973.07 Failure to pay fine or costs. If the fine, costs, penalty assessment, applicable domestic abuse assessment payment, applicable driver improvement surcharge payment, applicable natural resources assessment or applicable natural resources restitution payment are not paid as required by the sentence, the defendant may be committed to the county jail until the fine, costs, penalty assessment, applicable domestic abuse assessment payment, applicable driver improvement surcharge payment, applicable natural resources assessment or applicable natural resources restitution payment are paid or discharged for a period fixed by the court not to exceed 6 months.

History: 1977 c. 29; 1979 c. 34, 111; 1981 c. 20.

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

Where fine and payment schedule are reasonably suited to offender's means, offender carries heavy burden of showing inability to pay. *Will v. State*, 84 W (2d) 397, 267 NW (2d) 357 (1978).

973.075 Forfeiture of property derived from crime and certain vehicles. (1) The following are subject to seizure and forfeiture under ss. 973.075 to 973.077:

(a) All property, real or personal, including money, directly or indirectly derived from or realized through the commission of any crime.

(b) All vehicles, as defined in s. 939.22 (44), which are used to transport any property or weapon used or to be used or received in the commission of any felony, but:

1. No vehicle used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under ss. 973.075 to 973.077 unless it appears that the owner or other person in charge of the vehicle had knowledge of or consented to the commission of the felony;

2. No vehicle is subject to forfeiture under ss. 973.075 to 973.077 by reason of any act or omission established by the owner of the vehicle to have been committed or omitted without his or her knowledge or consent; and

3. A forfeiture of a vehicle encumbered by a bona fide perfected security interest is subject to the interest of the secured party if he or she neither had knowledge of nor consented to the act or omission.

(2) A law enforcement officer may seize property subject to this section upon process issued by any court of record having jurisdiction over the property. Seizure without process may be made under any of the following circumstances:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under any administrative or special inspection warrant.

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state.

(c) The officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety.

(d) The officer has probable cause to believe that the property was derived from or realized through a crime or that the property is a vehicle which was used to transport any property or weapon used or to be used or received in the commission of any felony.

(3) If there is a seizure under sub. (2), proceedings under s. 973.076 shall be instituted. Property seized under this section is not subject to replevin, but is deemed to be in the custody of the sheriff of the county in which the seizure was made subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is seized under this section, the person seizing the property may do any of the following:

(a) Place the property under seal.

(b) Remove the property to a place designated by it.

(c) Require the sheriff of the county in which the seizure was made to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(4) When property is forfeited under ss. 973.075 to 973.077, the agency seizing the property may sell the property that is not required by law to be destroyed or transferred to another agency. The agency may retain any vehicle for official use or sell the vehicle. The agency seizing the property may deduct 50% of the amount received for administrative expenses of seizure, maintenance of custody, advertising and court costs and the costs of investigation and

prosecution reasonably incurred. The remainder shall be deposited in the school fund as the proceeds of the forfeiture. If the property forfeited under ss. 973.075 to 973.077 is money, all the money shall be deposited in the school fund.

(5) All forfeitures under ss. 973.075 to 973.077 shall be made with due provision for the rights of innocent persons. Any property seized but not forfeited shall be returned to its rightful owner. Any person claiming the right to possession of property seized may apply for its return to the circuit court for the county in which the property was seized. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property returned if:

(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or

(b) All proceedings in which it might be required have been completed.

(6) Sections 973.075 to 973.077 do not apply to crimes committed under ch. 161.

History: 1981 c. 267.

973.076 Forfeiture proceedings. (1) TYPE OF ACTION; WHERE BROUGHT. An action brought to cause the forfeiture of any property specified in s. 973.075 (1) is an action in rem. The circuit court for the county in which the property was seized shall have exclusive jurisdiction over any proceedings regarding the property.

(2) **COMMENCEMENT.** (a) The district attorney of the county within which the property was seized or in which the defendant is convicted shall commence the forfeiture action within 30 days after the seizure of the property or the date of conviction, whichever is earlier, except that the defendant may request that the forfeiture proceedings be adjourned until after adjudication of any charge concerning a crime which was the basis for the seizure of the property. The request shall be granted. The forfeiture action shall be commenced by filing a summons, complaint and affidavit of the person who seized the property with the clerk of circuit court and by serving authenticated copies of such papers upon the person from whom the property was seized and upon any person known to have a bona fide perfected security interest in the property. Service shall be made in accordance with ch. 801.

(b) Upon service of an answer, the action shall be set for hearing within 60 days of the service of the answer but may be continued for cause or upon stipulation of the parties.

(c) In counties having a population of 500,000 or more, the district attorney or the corporation counsel may proceed under par. (a).

(3) **BURDEN OF PROOF.** The state shall have the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the property is subject to forfeiture under s. 973.075 to 973.077.

History: 1981 c. 267.

973.077 Burden of proof; liabilities. (1) It is not necessary for the state to negate any exemption or exception regarding any crime in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under s. 973.076. The burden of proof of any exemption or exception is upon the person claiming it.

(2) In the absence of proof that a person is the duly authorized holder of an appropriate federal registration or order form, the person is presumed not to be the holder of the registration or form. The burden of proof is upon the person to rebut the presumption.

(3) No liability is imposed by ss. 973.075 to 973.077 upon any authorized law enforcement officer or employe engaged in the lawful performance of duties.

History: 1981 c. 267.

973.08 Records accompanying prisoner.

(1) When any defendant is sentenced to the state prisons, a copy of the judgment of conviction shall be delivered by the officer executing the judgment to the warden or superintendent of the institution when the prisoner is delivered.

(2) The transcript of any portion of the proceedings relating to the prisoner's sentencing shall be filed at the institution within 120 days from the date sentence is imposed.

(3) The transcript of all other testimony and proceedings upon order of a court shall be delivered to a prisoner within 120 days of his or her request.

(4) The transcript of all other testimony and proceedings upon order of a court shall be delivered to the department within 120 days of its request.

(5) The clerk of court shall file or deliver a transcript under sub. (2), (3) or (4).

History: 1971 c. 298 s. 26 (1); 1977 c. 187; Sup Ct. Order, eff. 1-1-80; 1979 c. 221.

973.09 Probation. (1) (a) Except as provided in par. (c) or if probation is prohibited for

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a particular offense by statute, if a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

(b) If the court places the person on probation, the court shall require restitution designed to compensate the victim's pecuniary loss resulting from the crime to the extent possible, unless the court finds there is substantial reason not to order restitution as a condition of probation. If the court does not require restitution to be paid to a victim, the court shall state its reason on the record. A court may require that restitution be paid to an insurer or surety which has paid any claims or benefits to or on behalf of the victim. If the court does require restitution, it shall specify the amount consistent with sub. (1m) and shall notify the department of justice of its decision if the victim may be eligible for compensation under ch. 949. If the court places the person on probation, it shall require the probationer to pay a surcharge equal to 5% of the total amount of any restitution, costs, attorney fees and any fines and related payments ordered under s. 973.05 (1) to the clerk of circuit court or the department of health and social services, as applicable under sub. (1m), for administrative expenses under this section.

(c) When a person is convicted of the crime specified in s. 940.01, the court shall not place the person on probation.

(1g) If the court places the person on probation, the court may require that the probationer reimburse the county or the state, as applicable, for any costs for legal representation to the county or the state for the defense of the case. In order to receive this reimbursement, the county or the state public defender shall provide a statement of its costs of legal representation to the defendant and court within the time period set for documenting the pecuniary loss of the victim under sub. (1m) (b). The time period does not apply to statements of costs for legal representation by private attorneys appointed under s. 977.08.

(1m) (a) In determining the amount and method of payment of restitution, the court shall consider the financial resources and future ability of the probationer to pay. The court may provide for payment of restitution to the victim up to but not in excess of the pecuniary loss caused by the offense. The probationer may

assert any defense that he or she could raise in a civil action for the loss sought to be compensated by the restitution order. If the court also orders payment of fines, related payments under s. 973.05 and costs under s. 973.06, it shall set the amount of fines, related payments and costs in conjunction with the amount of restitution and issue a single order, signed by the judge, covering all payments required as a condition of probation. If the costs for legal representation by a private attorney appointed under s. 977.08 are not established at the time of issuance of the order, the court may revise the order to include those costs at a later time. The court shall consider the interest of the victim in receiving restitution when determining whether to order payment of costs.

(b) Upon the order of the court, the district attorney, the department of health and social services or an official of a law enforcement agency, as defined in s. 165.83 (1) (b), shall document, within 30 days or a different period of time specified by the court, the nature and amount of the victim's pecuniary loss. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of the victim's pecuniary loss resulting from the offense or the amount of any payment ordered under par. (a). No hearing is required unless this application is made.

(c) The court shall not establish a payment schedule extending beyond the maximum term of probation that could have been imposed for the offense under sub. (2). Payments shall be applied first to satisfy the ordered restitution in full, then to pay any fines and related payments under s. 973.05, then to pay costs other than attorney fees and finally to reimburse county or state costs of legal representation.

(d) Payment of restitution, costs, attorney fees, fines and related payments under s. 973.05 ordered under this section shall be to the department of health and social services, unless the county board authorizes that payments in the county shall be to the clerk of circuit court. The clerk or the department shall establish a separate account for each probationer for the collection and disbursement of funds. A portion of each payment shall be considered the surcharge for administrative expenses under sub. (1) (b).

(e) The clerk or the department shall notify the court if the probationer does not make the payments required by the court. If the clerk is acting under this subsection, he or she shall notify the department of any such noncompliance.

(1r) If restitution is ordered for a merchant who has had merchandise stolen or has otherwise been wrongfully deprived of his or her

merchandise, the merchant's pecuniary loss shall be the retail value of the merchandise.

(2) The original term of probation shall be:

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

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

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

(b) If restitution has been required, the clerk or the department, as applicable under sub. (1m), shall notify the sentencing court of the status of the ordered payments at least 90 days before the probation expiration date. If the clerk is acting under sub. (1m), he or she shall give the department the same notification. If payment as ordered has not been made, the court shall hold a probation review hearing prior to the expiration date, unless the hearing is voluntarily waived by the probationer with the knowledge that waiver may result in an extension of the probation period or in a revocation of probation. A probationer shall not be discharged from probation until the court determines that payment of the ordered restitution, costs, attorney fees, fines and related payments under s. 973.05 has been made or that there is substantial reason not to continue to require payment.

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

(4m) If the defendant is placed on probation, the court shall determine if restitution would be an appropriate condition of probation. If restitution is ordered, the court shall inquire to see if an award has been made under ch. 949 and if the department of justice is subrogated to the cause of action under s. 949.15. If the restitution ordered is less than or equal to the award under ch. 949, the restitution shall be paid only to the general fund. If the restitution ordered is greater than the award under ch. 949, the general fund shall receive an amount equal to the award under ch. 949 and the balance shall be paid to the victim.

(5) When the probationer has satisfied the conditions of his probation, he shall be dis-

charged and the department shall issue him a certificate of final discharge, a copy of which shall be filed with the clerk.

(6) If a crime victim is paid an award under ch. 949 for any loss arising out of a criminal act, the state is subrogated to the rights of the victim to any restitution required as a condition of probation by the court. The rights of the state are subordinate to the claims of victims who have suffered a loss arising out of the offenses or any transaction which is part of the same continuous scheme of criminal activity.

(7) Requiring restitution as a condition of probation does not limit or impair the right of a victim to sue and recover damages from the probationer in a civil action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution paid by the probationer to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.

(7m) (a) The court may require as a condition of probation that the probationer perform community service work for a public agency or a nonprofit charitable organization. The number of hours of work required may not exceed what would be reasonable considering the seriousness of the offense and any other offense which is read into the record at the time of conviction. An order may only apply if agreed to by the probationer and the organization or agency. The court shall ensure that the probationer is provided a written statement of the terms of the community service order and that the community service order is monitored.

(b) Any organization or agency acting in good faith to which a probationer is assigned pursuant to an order under this subsection has immunity from any civil liability in excess of \$25,000 for acts or omissions by or impacting on the probationer.

(8) In this section, "pecuniary loss" means:

(a) All special damages, but not general damages, substantiated by evidence in the record, which a person could recover against the probationer in a civil action arising out of the facts or events constituting the probationer's criminal activities, including, without limitation because of enumeration, the money equivalent of loss resulting from property taken, destroyed, broken or otherwise harmed and out-of-pocket losses, such as medical expenses; and

(b) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of

charges or cooperating in the investigation and prosecution of the offense.

History: 1971 c. 298; 1979 c. 119, 189, 238, 355, 356; 1981 c. 50, 88, 326, 352, 391.

Judicial Council Note, 1981: A cross-reference to s. 973.15 has been inserted to clarify that the provisions of that statute govern the imposition of sentence even though the court stays execution of the sentence under this statute. [Bill 341-A]

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

Terminology of work-release under (4) and Huber law privileges under 56.08 cannot be used interchangeably without danger of inappropriate sentence. *Yingling v. State*, 73 W (2d) 438, 243 NW (2d) 420.

Claims of credit for pretrial or preconviction incarceration may be made only as to sentences imposed, and not to periods of confinement during nonworking hours imposed as a condition of probation under (4). Full confinement for one year as a condition of probation is not authorized under (4). *State v. Gloudemans*, 73 W (2d) 514, 243 NW (2d) 220.

Probation condition that probationer not contact her codefendant fiancé was permissible infringement of her constitutional rights because the condition was reasonably related to rehabilitation and was not overly broad. *Edwards v. State*, 74 W (2d) 79, 246 NW (2d) 109.

Where defendant is sentenced for 3 charges and placed on consecutive probation for the 4th charge, trial court may not impose probation condition that defendant make restitution for all charges. *Garski v. State*, 75 W (2d) 62, 248 NW (2d) 425.

Failure to make restitution is not cause for extending probation under (3) if probationer demonstrates good faith effort to pay but lacks capacity to pay during probation. *Huggett v. State*, 83 W (2d) 790, 266 NW (2d) 403 (1978).

Order to pay restitution, in amount to be determined later, authorized collection of funds from defendant. *Thieme v. State*, 96 W (2d) 98, 291 NW (2d) 474 (1980).

Remand for resentencing was proper procedure where trial court improperly imposed period of probation to run concurrently with period of parole. *State v. Givens*, 102 W (2d) 476, 307 NW (2d) 178 (1981).

Issuance of warrant during probationary term tolls running of term. *State ex rel. Cox v. H & SS Dept.* 105 W (2d) 378, 314 NW (2d) 148 (Ct. App. 1981).

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

(2) If a probationer violates the conditions of probation, the department may:

(a) If the probationer has not already been sentenced, order the probationer brought before the court for sentence which shall then be imposed without further stay under s. 973.15; or

(b) If the probationer has already been sentenced, order the probationer to prison, and the term of the sentence shall begin on the date the probationer enters the prison.

(3) A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison. The officer shall execute the order as a warrant for arrest but any officer may, without

order or warrant, take the probationer into custody whenever necessary in order to prevent escape or enforce discipline or for violation of probation.

History: 1971 c. 298; 1975 c. 41, 157, 199; 1977 c. 347; 1981 c. 50.

Judicial Council Note, 1981: Sub. (2) (a) has been amended to clarify that, upon revocation of probation of an offender from whom sentence was originally withheld, the court must impose sentence in accordance with s. 973.15. That section now permits the court to order that any sentence be concurrent with or consecutive to any sentence imposed at the same time or previously. [Bill 341-A]

Before probation can be revoked the department must hold a hearing and make a record so that on judicial review it can be determined whether the department acted arbitrarily or capriciously. The hearing need not be formal. *State ex rel. Johnson v. Cady*, 50 W (2d) 540, 185 NW (2d) 306.

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

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

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

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

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

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

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

Department of H & SS probation files and records are public records and admissible as such at probation revocation hearing. *State ex rel. Prellwitz v. Schmidt*, 73 W (2d) 35, 242 NW (2d) 227.

Time spent in jail awaiting revocation is deducted from maximum sentence despite option available to defendant to spend the time in prison. *State ex rel. Solie v. Schmidt*, 73 W (2d) 76, 242 NW (2d) 244.

When the department overrules its hearing examiner and revokes probation, it must provide a statement of the evidence relied upon and the reasons for revoking probation. *Ramaker v. State*, 73 W (2d) 563, 243 NW (2d) 534.

See note to Art. I, sec. 11, citing *State v. Tarrell*, 74 W (2d) 647, 247 NW (2d) 696.

Trial court had no authority to extend probation of defendant brought before court under (2). *State v. Balgie*, 76 W (2d) 206, 251 NW (2d) 36.

See note to Art. I, sec. 1, citing *State v. Evans*, 77 W (2d) 225, 252 NW (2d) 664.

See note to Art. I, sec. 8, citing *State v. Evans*, 77 W (2d) 225, 252 NW (2d) 664.

Court exceeded jurisdiction by releasing defendant on bail pending revocation proceedings. *State ex rel. DH & SS v. Second Jud. Cir. Ct.* 84 W (2d) 707, 267 NW (2d) 373 (1978).

See note to art. I, sec. 1, citing *State v. Aderhold*, 91 W (2d) 306, 284 NW (2d) 108 (Ct. App. 1979).

See note to art. I, sec. 8, citing *State ex rel. Alvarez v. Lotter*, 91 W (2d) 329, 283 NW (2d) 408 (Ct. App. 1979).

See note to art. I, sec. 12, citing *State v. White*, 97 W (2d) 517, 294 NW (2d) 36 (Ct. App. 1979).

See note to 57.06, citing 65 Atty. Gen. 20.

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

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

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

Probation and parole revocation in Wisconsin. 1977 WLR 503.

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

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

This section does not authorize 2 sentences for one crime. *State v. Upchurch*, 101 W (2d) 329, 305 NW (2d) 57 (1981).

973.13 Excessive sentence, errors cured.

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

973.14 Sentence to house of correction.

(1) In addition to the authority in ss. 53.18 and

56.18, prisoners sentenced to a county jail may be transferred by the sheriff to a house of correction without court approval.

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

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

History: 1977 c. 126.

973.15 Sentence, terms, escapes. (1) All sentences to the Wisconsin state prisons shall be for one year or more. Except as otherwise provided in this section, all sentences commence at noon on the day of sentence, but time which elapses after sentence while the convicted offender is at large on bail shall not be computed as any part of the term of imprisonment.

(2) The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.

(3) Courts may impose sentences to be served in whole or in part concurrently with a sentence being served or to be served in a federal institution or an institution of another state.

(4) When a court orders a sentence to the Wisconsin state prisons to be served in whole or in part concurrently with a sentence being served or to be served in a federal institution or an institution of another state:

(a) The court shall order the department to immediately inform the appropriate authorities in the jurisdiction where the prior sentence is to be served that the convicted offender is presently available to commence or resume serving that sentence; and

(b) The trial and commitment records required under s. 973.08 shall be delivered immediately to the warden or superintendent of the Wisconsin institution designated as the reception center to receive the convicted offender when he or she becomes available to Wisconsin authorities.

(5) A convicted offender who is made available to another jurisdiction under ch. 976 or in any other lawful manner shall be credited with service of his or her Wisconsin sentence or commitment under the terms of s. 973.155 for the duration of custody in the other jurisdiction.

(6) Sections 53.11 and 57.06 are applicable to an inmate serving a sentence to the Wisconsin state prisons but confined in a federal institution

or an institution in another state. Section 53.12 applies only during that portion of the sentence served in actual residence in a Wisconsin institution.

(7) If a convicted offender escapes, the time during which he or she is unlawfully at large after escape shall not be computed as service of the sentence.

(8) The sentencing court may stay execution of a sentence of imprisonment only:

- (a) For legal cause;
- (b) Under s. 973.09 (1) (a); or
- (c) For not more than 60 days.

History: 1973 c. 90; 1977 c. 347, 353, 447; 1981 c. 50, 292.

Judicial Council Note, 1981: Sub. (2) has been simplified to allow a court, in imposing a criminal sentence, to order that it be concurrent with or consecutive to any other sentence imposed at the same time or previously. The prior statute, although lengthier and more complicated, failed to achieve its apparent purpose of allowing consecutive sentencing in situations involving probation and parole revocations, escapes, etc. See *Drinkwater v. State*, 69 Wis. 2d 60 (1975); *Guyton v. State*, 69 Wis. 2d 663 (1975); *Bruneau v. State*, 77 Wis. 2d 166 (1977); *Smith v. State*, 85 Wis. 2d 650 (1978); and *Donaldson v. State*, 93 Wis. 2d 306 (1980).

This revision allows sentences to be made consecutive to any previously or simultaneously imposed sentence, without regard to whether the offender is "then serving" such sentence, is subject to parole revocation proceedings, or has received a new sentence between the time of an escape and a return to a state facility. The revised statute also governs the sentencing of probationers by virtue of the cross-references in ss. 973.09 (1) (a) and 973.10 (2) (a). [Bill 341-A]

Judicial Council Note, 1981: Sub. (8) has been added to specify the circumstances under which execution of a sentence of imprisonment may be stayed. Par. (a) references the rule of *Reinex v. State*, 51 Wis. 152 (1881) and *Weston v. State*, 28 Wis. 2d 136 (1965), whereby execution can be stayed for "legal cause", such as during the pendency of an appeal. Par. (b) cross-references the probation statute. Par. (c) is new. It allows the court to delay the commencement of a sentence for up to 60 days. The Wisconsin supreme court recently held that courts have no authority to stay execution of a sentence of imprisonment in the absence of such a statutory provision or legal cause. *State v. Braun*, 100 Wis. 2d 77 (1981). [Bill 736-A]

Revisor's Note: The following annotations concern s. 973.15, 1975 stats., which was repealed and recreated by ch. 353, laws of 1977.

All pre-sentence confinement because of indigency must be credited toward sentence imposed. *Klimas v. State*, 75 W (2d) 244, 249 NW (2d) 285.

Sentence of 5 years 14 days, subject to 14 days credit for pre-sentence confinement, was abuse of sentencing discretion. *Struzik v. State*, 90 W (2d) 357, 279 NW (2d) 922 (1979).

Court may consider parole eligibility in imposing sentence. *State v. Stuhr*, 92 W (2d) 46, 284 NW (2d) 459 (Ct. App. 1979).

See note to 975.06, citing *State v. Kruse*, 101 W (2d) 387, 305 NW (2d) 85 (1981).

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

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

973.155 Sentence credit. (1) (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" in-

cludes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) include custody of the convicted offender which is in whole or in part the result of a probation or parole hold under s. 57.06 (3) or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation or parole, the department shall make such a finding which shall be included in the revocation order.

(3) The credit provided in sub. (1) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.

(4) The credit provided in sub. (1) shall include good time earned under ss. 53.11, 53.43, 56.07 (3) and 56.19 (3), whichever are applicable. The department may promulgate rules under ch. 227 to provide criteria for the awarding of good time allowed under this subsection.

(5) If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.

History: 1977 c. 353; 1979 c. 154.

Department may not grant jail credit where it is not provided for by statute. OAG 29-82.

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

973.17 Judgment against a corporation.

(1) If a corporation fails to appear within the time required by the summons, the default of such corporation may be recorded and the

charge against it taken as true, and judgment shall be rendered accordingly.

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

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