CHAPTER 955.

PROCEEDINGS BEFORE AND AT TRIAL.

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955.01 Discharge of defendant. A prisoner charged with having committed a crime shall be discharged if not indicted or informed against before the end of 6 months after he is held to answer, unless it appears to the court that witnesses on the part of the state have been enticed or kept away, or are prevented from attending the court by sickness or accident.

History: 1951 c. 260; 1955 c. 660.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

955.04 Place of trial; subpoena. All trials shall be before the circuit court; and any defendant shall have compulsory process to compel the attendance of witnesses in his behalf.

History: 1955 c. 660.

955.05 Copy of information. Every person indicted or informed against for a crime for which he may be imprisoned in the state prison shall be entitled to a copy of the indictment or information and of all indorsements thereon without charge.

History: 1955 c. 660.

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

History: 1955 c. 660.

Where a defendant charged with burglary gave notice prior to trial that he intended to rely on an alibi that at the time of the alleged commission of the offense he was moving furniture from Milwaukee to Waukegan, and then abandoned such alibi on the trial and testified instead that at the time in question he was moving furniture from his mother's home in Milwaukee to another street address in Milwaukee, and gave the names of witnesses, the trial court, in the absence of any showing which would have justified a different ruling, properly excluded corroborative evidence offered in support of such new alibi on the ground of failure of substantial compliance with the requirements of this section. State v. Kopacka, 261 W 70, 51 NW (2d) 495.

The failure of the defendants' trial attorney to give notice of intent to prove an alibi was not prejudicial to the defendants where, although objections to certain questions asked of one defendant were sustained on the ground of such failure, the testimony of other witnesses for the defendants, if believed by the jury, would have placed the defendants at a place other than with the minor involved on the night in question. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

Whether good cause is shown for permitting the receipt of alibi testimony in the absence of advance written notice is a matter within the discretion of the trial court. A refusal to permit alibi testimony was not an abuse of discretion, although there was an admission by the defendant's trial attorney that he was unaware of the statute until the date of the trial. State v. Selbach, 268 W 538, 68 NW (2d) 37.

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

History: 1955 c. 660.

Where the instant arrest was for a criminal offense, and was made under the provisions of ch. 954, it was sufficient, in respect to the time when the defendant was entitled to be informed of the nature of the offense, that she was informed thereof when the complaint was read to her in court and before she pleaded guilty. State v. Harrison, 260 W 89, 50 NW (2d) 38.

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

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

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

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

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

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

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

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

History: 1951 c. 674; 1955 c. 660.

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

The defendant's motion to suppress the evidence seized by police officers from the trunk of her automobile, including the bodies of 2 infants, which motion was first made several weeks after the defendant had been arraigned and entered a plea of not guilty and only 2 days before the trial, and was renewed during the trial, was properly denied on the ground that the defendant was not surprised by the state's possession of such evidence and that the motion to suppress was not timely made. Potman v. State, 259 W 234, 47 NW (2d) 884.

Where the information was read to the defendant while he was present in court and it appeared that he was fully informed as to the charge against him, the fact that the record failed to disclose that the defendant had entered a plea to the information was immaterial. State v. Abdella, 261 W 393, 52 NW (2d) 924.

Where a criminal case and record were transferred from the county court of Portage county to the circuit court without the record being certified as provided by the act relating to such county court, but the circuit court had jurisdiction of the subject matter and acquired jurisdiction of the defendant's person by his appearance for trial, the defendant was not prejudiced by the lack of the certificate; further, his appearance, and his failure to make objection until after the trial, constituted a waiver of the objection if the proceeding was defective. State v. Abdella, 261 W 393, 52 NW (2d) 924.

Where the information charged a violation in the language of 340.60 (Stats. 1949), and the defendant was found guilty "as charged in the information," and the sentence described the offense as a violation in the language of 340.60 (Stats. 1949), the court's error in reciting that the defendant was sentenced under 340.69 (Stats. 1949), and the court's subsequent correction of the record to show that it was 340.60, did not constitute prejudicial error. State v. Abdella, 261 W 393, 52 NW (2d) 924.

In a prosecution for burglary, where the defendant's motion to quash the information on grounds that the defendant had been held for 72 hours without the issuance of a warrant, and had been forcibly taken from his home without any proper consideration, and had been badly beaten in resisting arrest, was not made until after the trial had begun and the jury had been selected and sworn although the defendant had had ample opportunity to make such a motion before the trial, the defendant's right to object to the prosecution and the sufficiency of the information on such grounds was waived, and the trial court's denial of such motion to quash, which motion was not supported by any proof, was not an abuse of discretion, under 355.09, Stats. 1947. Where the question raised by the defendant's motion to quash the information was not properly before the court, and the evidence received without objection showed beyond a reasonable doubt the defendant's guilt of burglary,

the judgment of conviction must be affirmed. Hansen v. State, 262 W 294, 55 NW (2d) 6.

In a prosecution for bribing a public officer, an indictment which failed to cite the number of the statute was defective under 955.14 (2), but such defect was waived under 955.09 (3) by failure to raise the objection thereto before trial, a motion made before trial to dismiss the indictment, on the ground that the municipal court was without jurisdiction to try the case, not being sufficient to appraise the court that the defendant's counsel was questioning the indictment on the ground of its failure to cite the number of the statute. State v. Sawyer, 263 W 218, 56 NW (2d) 811.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

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

(2) The information or indictment shall contain the name of the court in which the action is pending, the title of the action, the name of the defendant or a description sufficient to identify him, and a citation of the statute which he is charged with having violated, and shall conclude with the words "against the peace and dignity of the state."

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

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

History: 1955 c. 660.

An information charging a violation of 147.02, in the language of the statute, was sufficient to state an offense. State v. Harrison, 260 W 89, 50 NW (2d) 38.

Where an exemption is in a separate section of the statutes from the one in which the crime is defined, it is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 W 89, 50 NW (2d) 38.

In the absence of a bill of exceptions disclosing whether a proper motion, raising objection to the sufficiency of the complaint and information for not being couched in the words of the statute, was made, the supreme court will assume that if objection had been properly raised before the trial court the court would have permitted an amendment to conform with the statute, as permitted by 955.09 (8), 955.14 (3); further, under 957.16 (1), after verdict the pleading is deemed amended to conform to the proof if no objection based on such variance was timely raised on the trial. State v. Biller, 262 W 472, 55 NW (2d) 414.

See note to 959.09, citing State v. Sawyer, 263 W 218, 56 NW (2d) 811.

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

History: 1955 c. 660.

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

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

shall indorse "approved" upon it. Thereupon the action shall be dismissed and the defendant shall be discharged.

History: 1955 c. 660.

955.18 Preliminary examination; when a prerequisite to information. (1) No information shall be filed until the defendant has had a preliminary examination unless he waives such examination, except that informations may be filed without examination against persons bound over for trial pursuant to s. 48.45 for having violated that section, against fugitives from justice within the meaning of the constitution and laws of the United States and against corporations. The omission of a preliminary examination shall not invalidate any information unless the defendant moves to dismiss.

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

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

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

History: 1953 c. 538; 1955 c. 575, 660.

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

History: 1955 c. 660.

After the discharge of the defendant at a preliminary examination for want of evidence, the district attorney was not limited to the remedy of an appeal if an appeal would lie; he could cause another complaint to be made, and where he in good faith did so, his conclusion is not open to review, and the second preliminary examination, at which further admissible evidence was introduced, is deemed properly held. State ex rel. Tessler v. Kubiak, 257 W 159, 42 NW (2d) 496.

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

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

The State of Wisconsin,
v.
Name of defendant.

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

Dated ...., 19...

...., District Attorney.

History: 1955 c. 660.

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

History: 1955 c. 660; 1955 c. 696 s. 314.

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

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

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

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

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

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

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed

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

History: 1955 c. 660; 1955 c. 696 s. 315.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

955.37 **Mistake in charging crime.** When it appears before judgment that a mistake has been made in charging the proper crime, the defendant shall not be discharged if there appears to be good cause to detain him in custody to answer to the crime, and the district attorney may forthwith file an information charging said crime.

History: 1955 c. 660.

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

History: 1955 c. 660.

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

History: 1955 c. 660; 1955 c. 696 s. 308A.

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

History: 1955 c. 660.

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

History: 1955 c. 660.

No error was committed by the special prosecutor in stating to the petit jury that the defendant had been indicted by the grand jury. State v. Krause, 260 W 313, 50 NW (2d) 439.