CHAPTER 958.

APPEALS, NEW TRIALS AND WRITS OF ERROR.

958.01 Appeal from justice's court. Every defendant convicted before a municipal justice may appeal to the circuit court by giving the municipal justice notice thereof in writing within 5 days. He shall be committed to abide the sentence of the municipal justice until he gives bail in such reasonable sum and with such sureties as the municipal justice requires, with condition to appear at the court appealed to and prosecute his appeal and abide the sentence of the appellate court and in the meantime to keep the peace and be of good behavior.

History: 1967 c. 276 s. 39.

A review of Wisconsin criminal procedure. 1966 WLR 430.

958.02 Duty of justice. On such appeal the justice shall make a copy of the conviction and the other proceedings in the action and transmit the same with the bail bonds to the clerk of the appellate court. The fees of the justice shall be paid by the county.

958.03 Fees not advanced on appeal. The appellant shall not be required to advance any fees, but if he is convicted in the appellate court or if sentenced for failure to prosecute his appeal, he may be required to pay the whole or any part of the costs.

958.04 Failure to prosecute; judgment for costs. (1) DEFAULT. If the appellant fails to diligently prosecute his appeal, he may be defaulted on his bail bond and the appellate court may sentence him as if he had been convicted in that court; and process may issue to bring him into court. If he is fined, judgment shall be for the fine and for the costs in both courts against him and his sureties.

(2) APPEAL DISMISSED. If the defendant fails to bring the action to trial before the end of the term following the one during which his appeal was taken, the appeal may be dismissed; and the judgment of the lower court enforced.

958.05 Forfeiture; how informer paid. In an action brought upon such a bail bond the penalty thereof may be forfeited, or if by leave of court such penalty had been paid without an action or before judgment is given and if by law any forfeiture accrues to any person, the court may award to him such sum as he may be entitled to out of such forfeiture.

958.06 New trial; sentence; service of affidavits; writ of error. (1) Within one year after the trial and on motion of the defendant the court may grant a new trial for any cause for which a new trial may be granted in civil cases, but on such terms and conditions as the court directs. The motion shall be signed by the defendant or his attorney and shall set forth grounds upon which the defendant relies for a new trial. The motion shall be filed with the clerk of the court at least 20 days before the argument of the motion, but the court may, by order, fix a shorter time. If the trial judge is disabled or no longer in office, his successor or another judge may hear and determine the motion.

(2) If the defendant desires to use affidavits upon his motion, copies of the same shall be served on the district attorney at least 20 days before the argument of the motion or such shorter time as the court designates. If a new trial is denied, the supreme court shall issue a writ of error on the application of the defendant, and may review the order refusing a new trial and may render such judgment as it deems proper.

(3) (a) A new trial shall proceed in all respects as if there had been no former trial. On the new trial the defendant may be convicted of any crime charged in the indictment or information irrespective of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to on the new trial.

(b) If the new trial results in the conviction of the defendant, the trial court shall make allowance for and deduct from sentence imposed whatever time of imprisonment the defendant has served by reason of the acts constituting the offense with which he is charged, so that upon no account may the aggregate term exceed the maximum term provided by the statutes therefor.

(c) If a defendant is convicted following a new trial and is sentenced to a term of confinement, any time served in prison under the earlier sentence for the same offense shall be counted as time served in establishing eligibility for parole under s. 57.06 (1) (a).

History: 1963 c. 22.

A motion for a new trial can be made after judgment. State v. Nutley, 24 W (2d) 527, 129 NW (2d) 155.

While the words new trial may mean different things in different contexts, the words "new trial" as used in (3) are construed as encompassing redetermination of guilt, irrespective of whether the original or subsequent determination was made on a plea of guilty. The provisions in (3) (b) and (c), requiring the trial court where a new trial results in conviction to make allowances for and deduct from a sentence imposed whatever time a defendant has theretofore served and counting time served in prison under an earlier sentence for the same offense, in establishing eligibility for parole, were designed to revise the preexisting rule, so that a defendant upon redetermination of guilt should receive allowance for whatever time of imprisonment he had served by reason of the acts constituting the offense with which he was charged. State ex rel. Eastman v. Burke, 28 W (2d) 170, 136 NW (2d) 297.

Under (1) a trial is over as soon as the jury verdict is rendered or finding of fact is made. Where defendant by absconding prevented sentencing for 2 years, he could not then ask for a new trial since the trial court could not grant it. Strong v. State, 36 W (2d) 324, 152 NW (2d) 890.

958.07 Writ of error coram nobis. The writ of error coram nobis may be issued by the trial court at any time upon the verified petition of the defendant showing sufficient grounds therefor, which may be supported by one or more affidavits. The petition and writ shall be served on the district attorney, who may move to quash the writ or make return thereto, or both. The court may hear and determine the writ either upon the affidavits submitted by the parties or upon testimony or both, in its discretion. The party aggrieved may have the determination of the trial court reviewed by the supreme court upon appeal or writ of error.

Coram nobis is a discretionary writ encompassing only errors of fact outside the record unknown to the trial court and which if known would have prevented the entry of judgment. It does not lie to correct errors of law or fact appearing on the record. A denial of counsel for appeal purposes under the old practice and improper use of John Doe testimony will not justify the writ. State v. Kanieski, 30 W (2d) 573, 141 NW (2d) 196.

An issue which can be reached by habeas corpus should not be considered on an application for coram nobis; this includes perjury of a witness at the trial. State v. Kopacka, 30 W (2d) 580, 141 NW (2d) 260.

The proper procedure in determining on petition for writ of error coram nobis whether an indigent is entitled to appointment of counsel to prosecute the writ is, as in petitions for writs of habeas corpus, for the court to which the petition is addressed to analyze the merits of the petition, and if persuaded that there is reasonable merit in the petition and a reasonable likelihood of success, then counsel for the indigent should be appointed. State v. Randolph, 32 W (2d) 1, 144 NW (2d) 441.

The trial court did not err in dismissing a petition for writ of error coram nobis filed by a defendant convicted of prison escape whose sole alleged grounds therefor were that he was not afforded counsel at the preliminary examination; that he was inadequately represented upon arraignment; and because he was singled out arbitrarily for prosecution—since none of such grounds met the two-fold requirements which are a prerequisite for granting coram nobis. State v. Randolph, 32 W (2d) 1, 144 NW (2d) 441.

958.075 Misdemeanor appeals from county court. (1) Appeals in misdemeanor cases are to the circuit court for the county and the defendant is entitled to a stay of execution upon furnishing bail in such reasonable sum as the county or circuit court may fix.

(2) Appeals by the state are subject to the limitations of s. 958.12.

(3) Within 15 days after judgment, appeal may be taken to circuit court by filing notice of appeal with the clerk of the trial court and by serving notice of appeal on the opposing party or his attorney.

(4) Within 10 days after the notice of appeal is filed with the clerk, he shall return the case file, together with the entire record and including all transcripts, exhibits and other matters therein to the circuit court, and shall notify the parties of such filing in said circuit court.

(5) On appeal to the circuit court there shall be a trial de novo and the parties therein may submit the matter upon a stipulated statement of facts, and an appeal may be taken although the sentence has been served or the fine paid.

History: 1961 c. 561.

Appeal from a conviction of contempt of court in county court lies to the supreme court, not the circuit court under this section. State ex rel. Jenkins v. Fayne, 24 W (2d) 476, 129 NW (2d) 147.

An appeal from a misdemeanor conviction lies only to the circuit court even though defendant is sentenced as a recidivist under 939.62. Harms v. State, 36 W (2d) 282, 153 NW (2d) 78.

958.08 Reporting case to supreme court. (1) WHEN AUTHORIZED. If there is a conviction, and a question of law arose upon the trial which in the opinion of the court is so important or doubtful as to require the decision of the supreme court, the trial court shall, if the defendant consents, report the question to the supreme court, and further proceedings shall be stayed in the trial court.

(2) BAIL. A defendant (other than one accused of a crime punishable by imprisonment for life) for whose benefit a report is made as provided in sub. (1) may give bail in such sum as the judge orders, with sufficient sureties for his appearance in the supreme court at the next term thereof, and for his good behavior in the meantime.

(3) COMMITMENT; WRIT OF ERROR. If the defendant does not give bail, he shall be committed to jail to await the decision of the supreme court. The clerk of the trial court shall file a certified copy of the record and proceedings in the case in the supreme court. After the case is remanded by the supreme court, the trial court shall render such judgment or make such order thereon as law and justice require. The proceedings here prescribed shall not deprive the defendant of a writ of error.

958.11 How writ of error issues. In criminal cases writs of error shall issue of course out of, and shall be returnable to the supreme court, but they shall not stay execution of judgment except as provided in s. 958.14.

958.115 Transcripts. The provisions relating to serving and approving transcripts in civil actions shall apply in criminal cases, but the time for serving a proposed transcript shall be 3 months from service of notice of appeal or 3 months from issuance of a writ of error.

History: 1963 Sup. Ct. Order, 17 W (2d) xx; 1964 Sup. Ct. Order, 24 W (2d) vi.

958.12 State's appeal. (1) A writ of error or appeal may be taken by the state from any:

(a) Final order or judgment adverse to the state made before jeopardy has attached or after waiver thereof;

(b) Order granting a new trial;

(c) Judgment and sentence or order of probation not authorized by law;

(d) Judgment adverse to the state, upon questions of law arising upon the trial, with the permission of the trial judge, in the same manner and with the same effect as if taken by the defendant. A judgment acquitting the defendant of all or part of the charge shall be deemed adverse to the state.

(2) Whenever the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, in the manner provided by s. 274.12.

(1) (d) is not unconstitutional as exposing the defendant to second jeopardy. The ruling of a court on the sufficiency of evidence to go to the jury or sustain a verdict in a criminal case is a ruling on a question of law reviewable on the state's appeal from a judgment of acquittal, with the permission of the trial judge. State v. Nall, 248 W 584, overruled. State v. Kennedy, 15 W (2d) 600, 113 NW (2d) 372.

Appealability of judgment by state in case where court determines both law and fact discussed. State v. Gecht, 17 W (2d) 455, 117 NW (2d) 340.

958.13 Appeals to supreme court; time for taking. In lieu of prosecuting a writ of error, either party may appeal to the supreme court in the manner provided in civil cases. Either party has one year, after entry of the order or judgment appealed from, to serve notice of appeal or procure the issuance of a writ of error.

History: 1961 c. 561.

An order of a court sitting as a magistrate which denies a motion for transfer of the case to juvenile court is not appealable to the supreme court. State v. Koopman, 34 W (2d) 204, 148 NW (2d) 671.

958.14 Stay of execution. If a defendant appeals or procures a writ of error, the trial court may in its discretion, by order, stay execution of the judgment before the record is filed in the appellate court if a substantial question of law, other than the sufficiency of evidence, is presented by the record. After the record is filed in the appellate court, the circuit court judge or a justice of the supreme court may, by order, stay execution if upon the record there is a reasonable possibility that the judgment might be reversed. No stay shall be granted except upon reasonable notice to the district attorney or the attorney general. If a stay is granted, the defendant shall give bail in such sum as the court, circuit court judge or the justice of the supreme court ordering the stay requires, with sufficient sureties for his appearance in the appellate court at the current or next term thereof to prosecute his appeal or writ of error and to abide the sentence thereon.

History: 1961 c. 561.

A defendant convicted and placed on probation, who was 2 years later sentenced on violation of probation, cannot have a review of the original conviction by appeal or writ of error because of the lapse of time. The sentencing judgment can be reviewed but in this event the only questions are whether the court had jurisdiction, whether the sentence was proper and whether the judgment represented an abuse of discretion. Babbitt v. State, 23 W (2d) 446, 127 NW (2d) 405.