CHAPTER 974

APPEALS, NEW TRIALS AND WRITS OF ERROR

974.01 Misdemeanor appeals. (1) Appeals from the county court in misdemeanor cases are to the circuit court for the county on the record. Appeals from the circuit court in misdemeanors are to the supreme court.

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

(3) Within 40 days after notice of appeal is filed the appellant shall file with the clerk either a transcript of the reporter's notes of the trial or an agreed statement on appeal, or a statement that his appeal can be supported by the case file without the transcript. The appellant shall pay the costs of preparing the transcript. The county shall in all cases where required by the U.S. or Wisconsin constitution pay the costs of preparing the transcript if the defendant is financially unable to pay the costs.

(4) Within 10 days after the transcript, or agreed statement pursuant to sub. (5), or statement that the appeal can be supported by the case file without the transcript is filed with the clerk, the clerk shall return the case file, and any transcript or agreed statement, or statement as to the appeal being supported by the case file alone, which has been filed with him to the circuit court and shall notify the parties of such filing in the circuit court.

(5) In lieu of a transcript on appeal, the oral proceedings may be presented in an agreed statement signed by all the parties to the appeal. This shall be a condensed statement in narrative form of all of such portions of the oral proceedings as are necessary to determination of the question on appeal.

(6) On appeal, the circuit court has power similar to that of the supreme court under ch. 817 to review and to affirm, reverse or modify the judgment appealed from, and in addition it may order a new trial in whole or in part, which shall be in the circuit court.

(7) At any time after the filing in the circuit court of the return on appeal, any party to the action or proceeding, upon notice under s. 801.15 (4), may move that the judgment appealed from be affirmed, or modified and affirmed as modified, or that the appeal be dismissed, or may move for a new trial or a reversal. This motion shall state concisely the grounds upon which it is made and shall be heard on the record.

(8) Appeals by the state are subject to the limitations of s. 974.05.

History: 1971 c. 298; Sup. Ct. Order, 67 W (2d) 783.

The disposition made under 161.47, with probation without entering a judgment of guilt, is not appealable to the circuit court, because there is no judgment. State v. Ryback, 64 W (2d) 574, 219 NW (2d) 263.

974.02 New trial. (1) In felonies, a defendant may move in writing or with the consent of the state on the record to set aside a judgment of conviction and for a new trial in the interest of justice, or because of error in the trial or because of error in the jury instructions, or because the judgment of conviction is not supported by the evidence or is contrary to law, or based on newly discovered evidence; but such motion must be made, heard and decided within 90 days after the judgment of conviction is entered, unless the court by order made before its expiration extends such time for cause. Such motion, if not decided within the time allowed therefor, shall be deemed overruled. Filing of a motion for a new trial shall not prevent the trial court from imposing sentence.

(2) If the trial judge is disabled or no longer in office, his successor or another judge may hear and determine the motion.

(3) Every order granting a new trial shall specify the grounds therefor. In the absence of such specification, the order shall be deemed granted for error on the trial. No order granting a new trial in the interests of justice shall be valid or effective, unless the reasons that prompted the court to make such order are set forth in detail therein or the memorandum decision setting forth such reasons incorporated by reference in such order.

(4) A new trial shall proceed in all respects as if there had been no former trial. The former verdict or finding shall not be used or referred to on the new trial.

(5) A motion for a new trial is not necessary to review errors on a trial to the court without a jury.

History: 1971 c. 298.

Judicial Council Note, 1971: [As to sub. (1)] This eliminates a motion for new trial in misdemeanor cases. It also recognizes the right to move for a new trial in felony cases based on newly discovered evidence.

[As to sub. (4)] The stricken language is deleted in response to the U.S. Supreme Court decision in Benton v. Maryland 395 US. 784 (1969) which overruled Palko v. Connecticut, 302 US. 319 (1937). [Bill 867-A]

Where post-trial motions are not justified by prejudicial error or required in the interest of justice, counsel appointed to defend an indigent is to be commended for not prolonging the case. Schwamb v. State, 46 W. (2d) 1, 173 NW. (2d) 666.

974.02 (2), Stats. 1969, which provides, "If the trial judge is disabled or no longer in office, his successor or another judge may hear and determine the motion," expresses the majority rule to the effect that a judge who is substituted after the verdict of a jury is returned may hear and determine a motion for a new trial; thus, where after the verdict of the jury was received and accepted by the trial judge the latter became ill, defendant could not complain because another judge was substituted and passed upon defendant's motion for a new trial. State v. Herfel, 49 W. (2d) 513, 182 NW. (2d) 232.

Recantation of the accomplice who had testified for the state (by affidavit subsequently executed) stating that his testimony had been perjurious did not constitute grounds for a new trial where uncorroborated by any other newly discovered evidence, and especially had no legal significance in light of positive identification of defendant by the victim as well as another eyewitness. Nicholas v. State, 49 W. (2d) 683, 183 NW. (2d) 11.

A motion for a new trial is a motion for the retrial of issues and is not an appropriate remedy for one convicted on a guilty plea; however, such a motion may be deemed a motion for leave to withdraw a plea of guilty and for a trial, and in such a case the trial court has inherent power to hear the motion. State v. Stuart, 50 W. (2d) 66, 183 NW. (2d) 155.

Tests for the granting of a new trial in the interest of justice discussed. State v. Chabonian, 50 W. (2d) 574, 185 NW. (2d) 289.

Acceptance of the guilty plea could not be validated by argument that defendant's acts were within the proscriptions of the charged statute or that defendant did in fact understand the charge, for the court has a duty to fulfill the Ernst requirements on the record, and such knowledge cannot be imputed to the defendant from defendant's other statements or by recourse to the preliminary transcript where defendant never testified as to his knowledge of the charge or his understanding of the crime. McAllister v. State, 54 W. (2d) 224, 194 NW. (2d) 639.

A motion for a new trial on newly discovered evidence need not be granted where the evidence consists of the affidavits of 2 girls, one of which says that the crime was committed by someone else in their presence, and the other affidavit stating that both girls were frequently intoxicated and that affiant has no recollection of the alleged facts. Swonger v. State, 54 W. (2d) 468, 195 NW. (2d) 598.

Newly discovered evidence does not include newly discovered importance of evidence previously known and not used. Vara v. State, 56 W. (2d) 390, 202 NW. (2d) 10.

When a motion for a new trial is based on inadequacy of representation, trial counsel should be notified and given an opportunity to appear. State v. Simmons, 57 W. (2d) 285, 203 NW. (2d) 887.

While a motion for a new trial is directed to the discretion of the trial court and its order granting one will be affirmed unless there is an abuse of discretion, that rule is subject to the qualification that when the court has proceeded on an erroneous view of the law, that amounts to an abuse of discretion, which is also a ground for reversal. State v. Mills, 62 W. (2d) 186, 214 NW. (2d) 456.

Postconviction remedies in the 1970's. Eisenberg, 56 MLR 69.

The duties of trial counsel after conviction. Eisenberg, 1975 WBB No. 2.

974.03 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. The service of a notice of appeal or the issuance of a writ of error shall be made within 90 days after the entry of judgment or order appealed from. If a motion for a new trial has been made within the 90-day period, an appeal from the denial of the motion or from the judgment of conviction may be taken within 90 days after pronouncement of the order denying the motion or within 90 days after such motion is deemed overruled.

History: 1971 c. 298.

A defendant who has failed to move the trial court for withdrawal of his guilty plea is not entitled to seek such relief for the first time on appeal. State v. Guiden, 46 W. (2d) 328, 174 NW. (2d) 488.

The date of entry of judgment on the judgment roll establishes the commencement of the period for appeal. State v. Wollmer, 46 W. (2d) 334, 174 NW. (2d) 491.

Where defendant's appeal is not timely, the court has no jurisdiction to review errors. In the absence of compelling circumstances, the sufficiency of the evidence will not be reviewed where there was no motion for a new trial on that ground. Errors in instructions will not be considered if no motion for a new trial was made. State v. Charette, 51 W. (2d) 531, 187 NW. (2d) 203.

A claim of violation of a constitutional right will be deemed waived unless timely raised in the trial court. Tatum v. State, 51 W. (2d) 554, 187 NW. (2d) 137.

Since 974.01 (1) expressly provides that appeals in misdemeanor cases are to the circuit court, attempted recourse to 974.03 (which allows appeals to the supreme court and prescribes the time for taking the same), is precluded, for the latter statute is in turn qualified by 274.09 (1), which permits appeals to the supreme court from the county court except where express provision is made for an appeal to the circuit court. State v. Omernik, 54 W. (2d) 220, 194 NW. (2d) 617.

The supreme court has no jurisdiction when no motion for a new trial is made nor appeal filed within 90 days. Scheid v. State, 60 W. (2d) 575, 211 NW. (2d) 458.

The 90-day period is not enlarged by a defendant procuring an extension of time within which to move for a new trial under 974.02. State v. Shears, 64 W. (2d) 639, 219 NW. (2d) 241.

Postconviction remedies in the 1970's. Eisenberg, 56 MLR 69.

Appellate review of sentences in Wisconsin. Swoboda, 1971 WLR 1190.

974.04 Transcripts. The statutes relating to serving and approving transcripts in civil actions shall apply to criminal cases, but the time for serving a proposed transcript shall be 3 months from service of notice of appeal or 3 months from the filing with the trial court of a writ of error.

History: Sup. Ct. Order, 55 W. (2d) ix.

There is no reason to review by writ of error a denial of a motion for postconviction relief based on the same ground and same facts on which a previous petition for habeas corpus was denied. Smith v. State, 63 W. (2d) 496, 217 NW. (2d) 257.

974.05 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) Order or judgment the substantive effect of which results in:

1. Quashing an arrest warrant;

2. Suppressing evidence; or

3. Suppressing a confession or admission.

(2) Whenever the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 817.12.

(3) Permission of the trial court is not required for the state to appeal, but the district attorney shall serve notice of such appeal or of the procurement of a writ of error upon the defendant or his attorney.

History: 1971 c. 298; Sup. Ct. Order, 67 W (2d) 783.

Where the state appeals from an order suppressing evidence the defendant can ask for a review of another part of the order, although he could not appeal directly. State v. Beals, 52 W (2d) 599, 191 NW (2d) 221.

The fact that the state can appeal from an order suppressing evidence, but the defendant cannot, does not show a denial of equal protection of the law. State v. Withers, 61 W (2d) 37, 211 NW (2d) 456.

The granting of a motion to withdraw a guilty plea is a final order appealable by the state. State v. Bagnall, 61 W (2d) 297, 212 NW (2d) 122.

The trial court's setting aside of a jury finding of defendant's guilt in exhibiting an obscene film preview contrary to 944.21, and its dismissal of the information, was not appealable by the state because it was a final judgment adverse to the state made after jeopardy had attached, and jeopardy was not waived; hence the judgment was not within those situations from which a state appeal is authorized by this section. State v. Detco, Inc. 66 W (2d) 95, 223 NW (2d) 859.

974.06 Postconviction procedure. (1) A prisoner in custody under sentence of a court claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the prisoner is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the district attorney who shall file a written response within the time prescribed by the court.

(b) Appoint counsel pursuant to s. 970.02 (6), if, upon the files, records of the action and the response of the district attorney it appears that counsel is necessary.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(4) All grounds for relief available to a prisoner under this section must be raised in his original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the prisoner has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the prisoner.

(7) An appeal may be taken from the order entered on the motion as from a final judgment subject to ss. 974.03 and 974.05.

(8) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

History: 1971 c. 40 s. 93.

Plea bargaining as a basis for withdrawal of guilty plea and a new trial discussed. State v. Wolfe, 46 W (2d) 478, 175 NW (2d) 216.

Where defendant made a pro se motion within the time limited but counsel was not appointed until later, the court should hear the motion. He can withdraw a guilty plea as a matter of right if he establishes: (1) That there occurred a violation of a relevant constitutional right; (2) that this violation caused him to plead guilty; and (3) that at the time of his guilty plea he was unaware of potential constitutional challenges to the prosecution's case against him because of that violation. State v. Carlson, 48 W (2d) 222, 179 NW (2d) 851.

Defendant's contention that he concluded he was going to be sentenced under the Youth Service Act and would be incarcerated for no more than 2 years, whereas a 20-year sentence was imposed (assuming verity), constituted no grounds for withdrawal of the guilty plea, his trial defense counsel asserting at the postconviction hearing that such a sentence was a desired objective but that no agreement had been made with the district attorney that it could be achieved nor representation made to his client that the lesser sentence would be imposed. State v. Froelich, 49 W (2d) 551, 182 NW (2d) 267.

The sentencing judge is not disqualified from conducting a hearing on a postconviction motion to withdraw a

guilty plea unless he has interjected himself in the plea bargaining to the extent he may become a material witness or otherwise disqualify himself. Rahhal v. State, 52 W (2d) 144, 187 NW (2d) 800.

After a plea bargain for a recommendation of a one-year sentence by the prosecutor, where a presentence report recommended 2 years and defendant did not object, he cannot then withdraw his guilty plea. Farrar v. State, 52 W (2d) 651, 191 NW (2d) 214.

Postconviction procedure cannot be used as a substitute for appeal; trial errors such as sufficiency of the evidence, instructions and errors in admission of evidence cannot be raised. State v. Langston, 53 W (2d) 228, 191 NW (2d) 713.

Procedure to be followed as to postconviction motions discussed. Peterson v. State, 54 W (2d) 370, 195 NW (2d) 837.

No hearing need be granted where the record refutes defendant's claims and they can be found to have no merit. Nelson v. State, 54 W (2d) 489, 195 NW (2d) 629.

This section is not a remedy for an ordinary rehearing or reconsideration of sentencing on its merits. Only constitutional and jurisdictional questions may be raised. This section may be used to review sentences and convictions regardless of the date of prosecution. State ex rel. Warren v. County Court, 54 W (2d) 613, 197 NW (2d) 1.

A petition under this section is limited to jurisdictional and constitutional issues; it is not a substitute for a motion for a new trial. Vara v. State, 56 W (2d) 390, 202 NW (2d) 10.

When a defendant is informed that he might receive a maximum sentence of 20 years on an attempted murder charge and is then sentenced to 25 years, the sentence will be reduced to 20 years. Preston v. State, 58 W (2d) 728.

The question of sufficiency of the evidence cannot be reached by a motion under this section; the utter failure to produce any evidence could be, because conviction without evidence of guilt would be a denial of due process. Weber v. State, 59 W (2d) 371, 208 NW (2d) 396.

A motion for postconviction relief may be denied without a hearing if defendant fails to allege sufficient facts to raise a question of fact or presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. Where multiple grounds for relief are claimed, particularized rulings as to each are to be made in denying the motion without an evidentiary hearing. Smith v. State, 60 W (2d) 373, 210 NW (2d) 678.

Objection to the arrest, insufficiency of the complaint, or the use of illegal means to obtain evidence may not be raised for the first time under this section, in view of 971.31 (2). State v. Kuecey, 60 W (2d) 677, 211 NW (2d) 453.

When a defendant, ordered to be present at a hearing under this section, escapes prison, the court may summarily dismiss the petition. State v. John, 60 W (2d) 730, 211 NW (2d) 463.

An appeal from an order under this section in a misdemeanor case must be to the circuit court. State v. Brice, 61 W (2d) 397, 212 NW (2d) 596.

The supreme court as a caveat points out that it does not encourage the assignment of members of the prosecutor's staff to review petitions for postconviction relief. Holmes v. State, 63 W (2d) 389, 217 NW (2d) 657.

The facts must be alleged in the petition and the petitioner cannot stand on conclusory allegations, hoping to supplement them at a hearing. Levesque v. State, 63 W (2d) 412, 217 NW (2d) 317.

The failure to establish a factual basis for a guilty plea is of constitutional dimensions and is the type of error which can be reached by a 974.06 motion. Loop v. State, 65 W (2d) 499, 222 NW (2d) 694.

See note to art. I, sec. 1, citing Hall v. State, 66 W (2d) 630, 225 NW (2d) 493.

The necessity or desirability of the presence of defendant at a hearing on postconviction motions is a matter of discretion for the trial court and depends upon the existence of substantial issues of fact; hence, there was no abuse of discretion in denial of defendant's motion to be present at the hearing on his 974.06 motions where only issues of law were raised and defense counsel had other opportunities to consult with his client. Sanders v. State, 69 W (2d) 242, 230 NW (2d) 845.

Although the allegation that defendant was sick from extensive use of amphetamines at the time of his confession finds no support in the record of the original proceedings, a silent record does not conclusively show a defendant is entitled to no relief, and where defendant refuted his earlier statement that no promises were made to induce his confession other than that he would not have to go to jail that day and alleged a promise of probation, an issue of fact was presented requiring an evidentiary hearing. Zuehl v. State, 69 W (2d) 355, 230 NW (2d) 673.

In an appeal via writ of error to review a sentence for forgery consisting of an 8-year prison term with the additional requirement that restitution be made, the supreme court, while reaching the merits, determines that henceforth the procedures made applicable by the postconviction relief statute shall be the exclusive procedure utilized to seek correction of an allegedly unlawful sentence. Spannuth v. State, 70 W (2d) 362, 234 NW (2d) 79.

Review procedures provided by this statute are entirely adequate and must be employed before state remedies will be considered exhausted for purposes of federal habeas corpus statute. Bergenthal v. Mathews, 392 F Supp. 1267.

Postconviction remedies in the 1970's. Eisenberg, 56 MLR 69.

The duties of trial counsel after conviction. Eisenberg, 1975 WBB No. 2.

Wisconsin postconviction remedies. 1970 WLR 1145.

Postconviction procedure; custody requirements. 1971 WLR 636.