CHAPTER 968

COMMENCEMENT OF CRIMINAL PROCEEDINGS

968.01 Complaint. The complaint is a written statement of the essential facts constituting the offense charged. It may be made on information and belief. It shall be made upon oath before a district attorney or judge as provided in this chapter.

While a complaint in a criminal prosecution issued subsequent to arrest does not have for its purpose authorization for the seizure of the person of the defendant, it is a jurisdictional requirement for holding him for a preliminary examination or other proceedings; accordingly, the face of the complaint and any affidavits annexed thereto must recite probable cause for defendant's detention. State ex rel. Cullen v. Ceci, 45 W (2d) 432, 173 NW (2d) 175.

To be constitutionally sufficient to support issuance of a warrant of arrest and show probable cause, a complaint must contain the essential facts constituting the offense charged; hence a complaint in the instant case upon which the warrant for arrest of defendant's roommate was issued was fatally defective in merely repeating the language of the statute allegedly violated. (Language in State ex rel. Cullen v. Ceci, 45 W (2d) 432, that evidence at the hearing may be used, withdrawn.) State v. Williams, 47 W (2d) 242, 177 NW (2d) 611.

As to a charge of resisting arrest, a complaint stated in statutory language is sufficient and no further facts are necessary. State v. Smith, 50 W (2d) 460, 184 NW (2d) 889.

A complaint is sufficient as to reliability of hearsay information where the officer making it states that it is based on a written statement of the minor victim of the offense charged. State v. Knudson, 51 W (2d) 270, 187 NW (2d) 321.

A complaint in a prosecution for disorderly conduct, which alleged that the defendant at a stated time and place violated 947.01 (1), by interfering with a police officer, the complainant, while he was taking another person into custody, and stated that the charge was based on the complainant's personal observations, met the test of legal sufficiency and did not lack specificity so as to invalidate his conviction. State v. Becker, 51 W (2d) 659, 188 NW (2d) 449.

Defendant waives objection to the sufficiency of the complaint by not objecting before or at the time he pleaded to the information. Day v. State, 52 W (2d) 122, 187 NW (2d) 790.

A complaint alleging that an unidentified man stole property and gave it to defendant who passed it on is insufficient in not alleging that defendant saw the theft or knew that the property was stolen. State v. Haugen, 52 W (2d) 791, 191 NW (2d) 12.

A complaint is not defective because based on statements to an officer which cannot be admitted at the trial because the Miranda warning was not given. Such an objection is waived if not raised prior to trial. Gelhaar v. State, 58 W (2d) 547, 207 NW (2d) 88.

To charge a defendant with the possession or sale of obscene materials the complaint must allege that the defendant knew the nature of the materials; a charge that he acted "feloniously" is insufficient to charge scienter. State v. Schneider, 60 W (2d) 563, 211 NW (2d) 630.

The complaint here being based on the police officer's sworn statement of what the alleged victim described as having actually happened meets the test of reliability of the informer and constituted probable cause for the magistrate to proceed with the issuance of a warrant calling for the arrest of the defendant. Allison v. State, 62 W (2d) 14, 214 NW (2d) 437.

An absolute privilege attached to the alleged defamatory statements made by the defendant about the plaintiff to an assistant district attorney in seeking issuance of a criminal complaint. Bergman v. Hupy, 64 W (2d) 747, 221 NW (2d) 898.

A criminal complaint sufficiently alleges probable cause that the defendant has committed the alleged offense when it recites that a participant in the crime has admitted his own participation and implicates the defendant, since an inference may be reasonably drawn that the participant is telling the truth. Ruff v. State, 65 W (2d) 713, 223 NW (2d) 446.

A complaint, alleging defendant burglarized a trailer at a construction site and based in part upon the hearsay statements of the construction foreman that tools found in defendant's automobile had been locked in the trailer, was sufficient to satisfy the two-pronged test of Aguilar. Anderson v. State, 66 W (2d) 233, 223 NW (2d) 879.

See note to 943.20, citing Jackson v. State, 92 W (2d) 1, 284 NW (2d) 685 (Ct. App. 1979).

In determining sufficiency of complaint, credibility of informants or witnesses is adequately tested by 2-pronged Aguilar standard. State v. Marshall, 92 W (2d) 101, 284 NW (2d) 592 (1979).

See note to 345.11, citing State v. White, 97 W (2d) 193, 295 NW (2d) 346 (1980).

Forms similar to the uniform traffic citation which are used as complaints to initiate criminal prosecutions in certain misdemeanor cases issued by the sheriff are sufficient to confer subject matter jurisdiction on the court but any conviction which results from their use in the manner described in the

opinion is null and void. 968.02, 968.04, 971.01, 971.04, 971.05 and 971.08 discussed. 63 Atty. Gen. 540.

968.02 Issuance and filing of complaints. **(1)** Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for filing by the district attorney. The approval shall be in the form of a written indorsement on the complaint.

(2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to s. 968.03. Such filing commences the action.

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

History: 1977 c. 449.

See note to 968.01, citing 63 Atty. Gen. 540.

968.03 Dismissal or withdrawal of complaints. **(1)** If the judge does not find probable cause to believe that an offense has been committed or that the accused has committed it, he shall indorse such finding on the complaint and file the complaint with the clerk.

(2) An unserved warrant or summons shall, at the request of the district attorney, be returned to the judge who may dismiss the action. Such request shall be in writing, it shall state the reasons therefor in writing and shall be filed with the clerk.

(3) The dismissals in subs. (1) and (2) are without prejudice.

968.04 Warrant or summons on complaint. **(1)** WARRANTS. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint or after an examination under oath of the complainant or witnesses, when the judge determines that this is necessary, that there is probable cause to believe that an offense has been committed and that the accused has committed it, the judge shall issue a warrant for the arrest of the defendant or a summons in lieu thereof. The warrant or summons shall be delivered forthwith to a law enforcement officer for service.

(a) When an accused has been arrested without a warrant and is in custody or appears voluntarily before a judge, no warrant shall be issued and the complaint shall be filed forthwith with a judge.

(b) A warrant or summons may be issued by a judge in another county when there is no available judge of the county in which the complaint is issued. The warrant shall be returnable before a judge in the county in which the offense alleged in the complaint was committed, and the summons shall be returnable before the circuit court of the county in which the offense alleged in the complaint was committed.

(2) SUMMONS. (a) In any case the district attorney, after the issuance of a complaint, may issue a summons in lieu of requesting the issuance of a warrant. The complaint shall then be filed with the clerk.

(b) In misdemeanor actions where the maximum imprisonment does not exceed 6 months, the judge shall issue a summons instead of a warrant unless he believes that the defendant will not appear in response to a summons.

(c) If a person summoned fails to appear in response to a summons issued by a district attorney, the district attorney may proceed to file the complaint as provided in s. 968.02 and, in addition to indorsing his approval on the complaint, shall indorse upon the complaint the fact that the accused failed to respond to a summons.

(3) MANDATORY PROVISIONS. (a) *Warrant.* The warrant shall:

1. Be in writing and signed by the judge.

2. State the name of the crime and the section charged and number of the section alleged to have been violated.

3. Have attached to it a copy of the complaint.

4. State the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which he can be identified with reasonable certainty.

5. State the date when it was issued and the name of the judge who issued it together with the title of his office.

6. Command that the person against whom the complaint was made be arrested and brought before the judge issuing the warrant, or, if the judge is absent or unable to act, before some other judge in the same county. In judicial circuits having more than one judge the chief judge of the administrative district shall determine the judge before whom the initial appearance shall be made.

7. The warrant shall be in substantially the following form:

STATE OF WISCONSIN,

..... County

State of Wisconsin

vs.

..... (Defendant(s))

THE STATE OF WISCONSIN TO ANY LAW ENFORCEMENT OFFICER:

A complaint, copy of which is attached, having been filed with me accusing the defendant(s) of committing the crime of ..... contrary to sec. ....., Stats., and I having found that probable cause exists that the crime was committed by the defendant(s).

You are, therefore, commanded to arrest the defendant(s) and bring ..... before me, or, if I am not available, before some other judge of this county.

Dated ...., 19...

....(Signature)
.....(Title)

8. The complaint and warrant may be on the same form. The warrant shall be beneath the complaint. If separate forms are used, a copy of the complaint shall be attached to the warrant.

(b) *Summons.* 1. The summons shall command the defendant to appear before a court at a certain time and place and shall be in substantially the form set forth in subd. 3.

2. A summons may be served anywhere in the state and it shall be served by delivering a copy to the defendant personally or by leaving a copy at his usual place of abode with a person of discretion residing therein or by mailing a copy to the defendant's last-known address. It shall be served by a law enforcement officer.

3. The summons shall be in substantially the following form:

a. When issued by a judge:

STATE OF WISCONSIN,
..... County
State of Wisconsin
vs.
..... (Defendant)

THE STATE OF WISCONSIN TO SAID DEFENDANT:

A complaint, copy of which is attached, having been filed with me accusing the defendant of committing the crime of ..... contrary to sec. ....., Stats., and I having found that probable cause exists that the crime was committed by the defendant.

You, ..., are, therefore, summoned to appear before Branch ..... of the .... court of ..... County at the courthouse in the City of ..... to answer said complaint, on ....., 19.., at ..... o'clock in the ..... noon, and in case of your failure to appear, a warrant for your arrest will be issued.

Dated ....., 19...

....(Signature)
.....(Title)

b. When issued by a district attorney:

STATE OF WISCONSIN,
..... County
State of Wisconsin
vs.
.... (Defendant)

THE STATE OF WISCONSIN TO SAID DEFENDANT:

A complaint, copy of which is attached, having been made before me accusing the defendant of committing the crime of ..... contrary to sec. ....., Stats.

You, ..., are, therefore, summoned to appear before Branch ..... of the .... court of ..... County at the courthouse in the City of ..... to answer said complaint, on ....., 19.., at ..... o'clock in the ..... noon, and in case of your failure to appear, a warrant for your arrest may be issued.

Dated ....., 19...

..... (Signature)
.... District Attorney

4. The complaint and summons may be on the same form. The summons shall be beneath the complaint. If separate forms are used, a copy of the complaint shall be attached to the summons.

(4) SERVICE. (a) The warrant shall be directed to all law enforcement officers of the state. A warrant may be served anywhere in the state.

(b) A warrant is served by arresting the defendant and informing him as soon as practicable of the nature of the crime with which he is charged.

(c) An arrest may be made by a law enforcement officer without a warrant in his possession when he has knowledge that a warrant has been issued. In such case, the officer shall inform the defendant as soon as practicable of the nature of the crime with which he is charged.

(d) The law enforcement officer arresting a defendant shall indorse upon the warrant the time and place of the arrest and his fees and mileage therefor.

History: 1973 c. 12; 1975 c. 39, 41, 199; 1977 c. 449 ss. 480, 497.

See note to 968.01, citing State v. Williams, 47 W (2d) 242, 177 NW (2d) 611.

A warrant was properly issued upon sworn testimony of a sheriff that an accomplice had confessed and implicated defendant, since reliable hearsay is permitted and a confession is not inherently untrustworthy. Okrasinski v. State, 51 W (2d) 210, 186 NW (2d) 314.

Where complaint alleged that reliable informant procured sample of drugs from defendant's apartment, inference that informant observed defendant's possession of controlled substance satisfied Aguilar test. Scott v. State, 73 W (2d) 504, 243 NW (2d) 215.

Officer not in fresh pursuit had no authority to execute arrest warrant in Illinois; therefore, court never gained personal jurisdiction over accused. State v. Monje, 105 W (2d) 66, 312 NW (2d) 827 (Ct. App. 1981).

968.05 Corporations: summons in criminal cases. (1) When a corporation is charged with the commission of a criminal offense, the judge or district attorney shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before a court at a specific time and place.

(2) The summons for the appearance of a corporation may be served as provided for service of a summons upon a corporation in a civil action. The summons shall be returnable not less than 10 days after service.

Cross Reference: See 973.17 for provision for default judgment against a corporation.

968.06 Indictment by grand jury. Upon indictment by a grand jury a complaint shall be issued, as provided by s. 968.02, upon the person named in the indictment and the person shall be entitled to a preliminary hearing under s. 970.03, and all proceedings thereafter shall be the same as if the person had been initially charged under s. 968.02 and had not been indicted by a grand jury.

History: 1979 c. 291.

968.07 Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

(c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

(2) A law enforcement officer making a lawful arrest may command the aid of any person, and such person shall have the same power as that of the law enforcement officer.

If police have probable cause for arrest without a warrant they may break down a door to effect the arrest after announcing their purpose in demanding admission. The remedy for excessive force is not dismissal of the criminal charge. Nadolinski v. State, 46 W (2d) 259, 174 NW (2d) 483.

An arrest based solely on evidence discovered after an illegal search is invalid. State ex rel. Furlong v. Waukesha County Court, 47 W (2d) 515, 177 NW (2d) 333.

While probable cause for an arrest without a warrant requires that an officer have more than a mere suspicion, he does not need the same quantum of evidence necessary for conviction, but only information which would lead a reasonable officer to believe that guilt is more than a possibility, which information can be based in part on hearsay. State v. DiMaggio, 49 W (2d) 565, 182 NW (2d) 466.

An officer need not have a warrant in his possession to make a valid arrest. Schill v. State, 50 W (2d) 473, 184 NW (2d) 858.

An arrest is valid where defendant, when approached by the officer, volunteered the statement that he assumed they would be looking for him because he had been the last person to see the victim alive. Schenk v. State, 51 W (2d) 600, 187 NW (2d) 853.

Police have grounds to arrest without a warrant where they have information from a reliable informer that a crime is to be committed, where they check the information and where defendants attempt to escape when stopped. Molina v. State, 53 W (2d) 662, 193 NW (2d) 874.

A person is not under arrest and the officer is not attempting an arrest, so far as the right to use force is concerned, until the person knows or should know that the person restraining or attempting to restrain him is an officer. Celmer v. Quarberg, 56 W (2d) 581, 203 NW (2d) 45.

An arrest pursuant to a valid warrant is legal even though the officer entered defendant's home without warning or knocking, and therefore the court had personal jurisdiction. State v. Monsoor, 56 W (2d) 689, 203 NW (2d) 20.

The fact that a witness had identified defendant by photograph was sufficient to support an arrest even though the witness was not allowed to identify him at the trial. State v. Wallace, 59 W (2d) 66, 207 NW (2d) 855.

See note to art. I, sec. 11, citing State v. Taylor, 60 W (2d) 506, 210 NW (2d) 873.

Enforcement officers may make constitutionally valid arrests without warrants under (1) (d) where they have reasonable grounds to believe that the person has committed a crime. Rinehart v. State, 63 W (2d) 760, 218 NW (2d) 323.

The police force is considered as a unit. Where there is police-channeled communication to the arresting officer and he acts in good faith, the arrest is based on probable cause when facts exist within the police department. State v. Shears, 68 W (2d) 217, 229 NW (2d) 103.

Where bags were heavy and contained brick-like objects obtained in overnight trip and where defendant's house was under surveillance, there was probable cause for arrest for possession of marijuana. State v. Phelps, 73 W (2d) 313, 243 NW (2d) 213.

Test under (1) (d) is whether arresting officer could have obtained warrant on the basis of information known prior to arrest. Police may rely on eyewitness report of citizen informer. Loveday v. State, 74 W (2d) 503, 247 NW (2d) 116.

See note to 66.12, citing City of Madison v. Ricky Two Crow, 88 W (2d) 156, 276 NW (2d) 359 (Ct. App. 1979).

See note to art. I, sec. 11, citing State v. Lee, 97 W (2d) 679, 294 NW (2d) 547 (Ct. App. 1980).

Municipal police may arrest and detain a person for whom another municipality in another county has issued a civil arrest warrant. 61 Atty. Gen. 275.

City policeman is law enforcement officer and traffic officer within 345.22. 61 Atty. Gen. 419.

968.08 Release by law enforcement officer of arrested person. A law enforcement officer having custody of a person arrested without a warrant may release the person arrested without requiring him to appear before a judge if the law enforcement officer is satisfied that there are insufficient grounds for the issuance of a criminal complaint against the person arrested.

968.09 Warrant on failure to appear. (1) When a defendant or a witness fails to appear before the court as required, or violates a term of his bond or his probation, if any, the court may issue a bench warrant for his arrest which shall direct that he be brought before the court without unreasonable delay. The court shall state on the record at the time of issuance of the bench warrant the reason therefor.

(2) Prior to the defendant's appearance in court after his arrest under sub. (1), ch. 969 shall not apply.

History: 1971 c. 298.

A bench warrant may be directed to all law enforcement officers in the state without regard to whether the defendant is charged with violation of a state statute or county ordinance. The form of the warrant should be as suggested by 968.04 (3) (a) 7. 62 Atty. Gen. 208.

See note to 66.119, citing 70 Atty. Gen. 280.

968.10 Searches and seizures; when authorized. A search of a person, object or place may be made and things may be seized when the search is made:

(1) Incident to a lawful arrest;

(2) With consent;

(3) Pursuant to a valid search warrant;

(4) With the authority and within the scope of a right of lawful inspection;

(5) Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

(6) As otherwise authorized by law.

Totality of circumstances justified search for concealed weapon. Penister v. State, 74 W (2d) 94, 246 NW (2d) 115.

See note to Art. I, sec. 11, citing Kelly v. State, 75 W (2d) 303.

968.11 Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering and seizing the fruits of the crime; or

(4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

968.12 Search warrant; defined; issuance. (1) A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown. The warrant shall be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter, showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

(2) A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

History: 1971 c. 298.

Probable cause meeting constitutional requirements for issuance of the search warrant of defendant's premises was not established by testimony of a police officer that a youth found in possession of amphetamines informed the officer that a shipment of marijuana was being delivered to defendant's premises, where it was established that the officer had had no previous dealings with the informant and could not personally attest to the informant's reliability; hence the search warrant was invalid. State ex rel. Furlong v. Waukesha County Court, 47 W (2d) 515, 177 NW (2d) 333.

An affidavit reciting that a reliable informant had reported seeing a large quantity of heroin in defendant's apartment is sufficient to support a search warrant. State v. Mansfield, 55 W (2d) 274, 198 NW (2d) 634.

Unauthorized out-of-court disclosures of private marital communications may not be used in a proceeding to obtain a search warrant. Muetze v. State, 73 W (2d) 117, 243 NW (2d) 393.

Search warrant designating entire farmhouse occupied by accused and "other persons unknown" was not invalid despite multiple occupancy. State v. Suits, 73 W (2d) 352, 243 NW (2d) 206.

See note to Art. I, sec. 11, citing State v. Killory, 73 W (2d) 400, 243 NW (2d) 475.

Warrant authorizing search of "entire first-floor premises" encompassed balcony room which was part and parcel of first floor. Rainey v. State, 74 W (2d) 189, 246 NW (2d) 529.

See note to Art. I, sec. 11, citing State v. Starke, 81 W (2d) 399, 260 NW (2d) 739.

See note to Art. I, sec. 11, citing Franks v. Delaware, 438 US 154 (1978).

Zurcher: third party searches and freedom of the press. Cantrell. 62 MLR 35 (1978).

968.13 Search warrant; property subject to seizure. (1) A search warrant may authorize the seizure of the following:

(a) Contraband, which includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances, as defined in s. 161.01 (4), and the implements for smoking or injecting them.

(b) Anything which is the fruit of or has been used in the commission of any crime.

(c) Anything other than documents which may constitute evidence of any crime.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05 (2).

(2) In this section, "documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

History: 1971 c. 219; 1979 c. 81.

An adversary hearing is not necessary for the seizure of a limited quantity of obscene material as evidence but is necessary before more than evidentiary copies are seized. State ex rel. Howard v. O'Connell, 53 W (2d) 248, 192 NW (2d) 201.

968.135 Subpoena for documents. Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12 (1), a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13 (2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This section does not limit or affect any other subpoena authority provided by law.

History: 1979 c. 81, 177.

968.14 Use of force. All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant.

See note to Art. I, sec. 11, citing State v. Meier, 60 W (2d) 452, 210 NW (2d) 685.

968.15 Search warrants; when executable. (1) A search warrant must be executed and returned not more than 5 days after the date of issuance.

(2) Any search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it.

Execution of search warrant is timely if in compliance with (1) and if probable cause which led to issuance still exists at time of execution. Defense has burden of proof in timeliness challenge. State v. Edwards, 98 W (2d) 367, 297 NW (2d) 12 (1980).

968.16 Detention and search of persons on premises. The person executing the search warrant may reasonably detain and search any person on the premises at the time to protect himself from attack or to prevent the disposal or concealment of any item particularly described in the search warrant.

968.17 Return of search warrant. (1) The return of the search warrant shall be made within 48 hours after execution to the clerk designated in the warrant. The return shall be accompanied by a written inventory of any property taken. Upon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant.

(2) An affidavit or complaint made in support of the issuance of the warrant and the transcript of any testimony taken shall be filed with the clerk within 5 days after the date of the execution of any search warrant.

History: 1971 c. 298.

In computing the time within which a search warrant must be returned, the court may exclude the hours between 4:30 Friday and 8 A.M. Monday. Such a delay would not affect the validity of the search. State v. Meier, 60 W (2d) 452, 210 NW (2d) 685.

The trial court erred in suppressing controlled substances and associated paraphernalia seized pursuant to search warrant on the ground that a transcript of testimony upon which the warrant was based was not filed within 5 days of its execution, as required by (2), because: (1) 968.22 provides that no evidence seized under search warrant be suppressed due to technical irregularities not affecting defendant's substantial rights; (2) the 5-day filing requirement is a ministerial duty, a violation of which does not invalidate a search absent prejudice; and (3) there was no prejudice where the transcript was filed approximately 6 weeks prior to the filing of the information, before which defendant was statutorily precluded from making any motion to suppress. State v. Elam, 68 W (2d) 614, 229 NW (2d) 664.

968.18 Receipt for seized property. Any law enforcement officer seizing any items without a search warrant shall give a receipt as soon as practicable to the person from whose possession they are taken. Failure to give such receipt shall not render the evidence seized inadmissible upon a trial.

968.19 Custody of property seized. Property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer, who may leave it in the custody of the sheriff and take a receipt therefor, so long as necessary for the purpose of being produced as evidence on any trial.

968.20 Return of property seized. (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. 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, other than contraband or property covered under s. 948.165, 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.

(2) Property not required for evidence or use in further investigation, unless contraband or property covered under s. 948.165, may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

(3) (a) First class cities shall dispose of firearms or ammunition seized 12 months after taking possession of them if the owner has not requested their return and if the firearm or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding. Disposition procedures shall be established by ordinance or resolution and may include provisions authorizing an attempt to return to the rightful owner any firearms or ammunition which appear to be stolen or are reported stolen. If enacted, any such provision shall include a presumption that if the firearms or ammunition appear to be or are reported stolen an attempt will be made to return the firearms or ammunition to the rightful owner. If the return of the seized firearm or ammunition is not requested by its owner under sub. (1) and is not returned

by the officer under sub. (2), the seized firearm or ammunition shall be shipped to and become property of the state crime laboratory. The administrator or a person designated by the administrator may destroy any material for which the laboratory has no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratory has no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.06.

(b) Except as provided in par. (a) or sub. (4), the custodian of a seized firearm or ammunition, if the firearm or ammunition is not required for evidence or use in further investigation and has not been disposed of pursuant to a court order at the completion of a criminal action or proceeding, shall make reasonable efforts to notify all persons who have or may have an interest in the firearm or ammunition of the application requirements under sub. (1). If, within 30 days after the notice, an application under sub. (1) is not made and the seized firearm or ammunition is not returned by the officer under sub. (2), the seized firearm or ammunition shall be shipped to and become the property of the state crime laboratory. The administrator or a person designated by the administrator may destroy any material for which the laboratory has no use or arrange for the exchange of material with other public agencies. In lieu of destruction, shoulder weapons for which the laboratory has no use shall be turned over to the department of natural resources for sale and distribution of proceeds under s. 29.06.

(c) In this subsection, "administrator" has the meaning designated in s. 165.75 (1) (b).

(4) Any property seized which poses a danger to life or other property in storage, transportation or use and which is not required for evidence or further investigation shall be safely disposed of upon command of the person in whose custody they are committed. The city, village, town or county shall by ordinance or resolution establish disposal procedures. Procedures may include provisions authorizing an attempt to return to the rightful owner substances which have a commercial value in normal business usage and do not pose an immediate threat to life or property. If enacted, any such provision shall include a presumption that if the substance appears to be or is reported stolen an attempt will be made to return the substance to the rightful owner.

(5) A city, village, town or county may dispose of any firearm or ammunition under this section only by return to the rightful owner, destruction or transfer to the state crime laboratory.

History: 1977 c. 260; 1977 c. 449 s. 497; 1979 c. 221; 1981 c. 160.

Claimant of property seized has the burden of showing that it is not contraband and is not needed as evidence in a possible retrial. Money may be applied to the payment of counsel fees. Welter v. Sauk County Clerk of Court, 53 W (2d) 178, 191 NW (2d) 852.

968.21 Search warrant; secrecy. A search warrant shall be issued with all practicable secrecy, and the complaint, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search warrant is executed.

968.22 Effect of technical irregularities. No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

968.23 Forms. The following forms for use under this chapter are illustrative and not mandatory:

STATE OF WISCONSIN,

.... County.

AFFIDAVIT OR COMPLAINT.

In the ..... court of the ..... of .....

A. B., being duly sworn, says that on the ..... day of ....., A. D., 19.., in said county, in and upon certain premises in the (city, town or village) of .... in said county, occupied by ..... and more particularly described as follows: (describe the premises) there are now located and concealed certain things, to wit: (describe the things to be searched for) (possessed for the purpose of evading or violating the laws of the state of Wisconsin and contrary to section ..... of the Wisconsin statutes) (or, which things were stolen from their true owner, in violation of section ..... of the Wisconsin statutes) (or, which things were used in the commission of (or may constitute evidence of) a crime to wit: (describe crime) committed in violation of section ..... of the Wisconsin statutes).

The facts tending to establish the grounds for issuing a search warrant are as follows: (set forth evidentiary facts showing probable cause for issuance of warrant).

Wherefore, the said A. B. prays that a search warrant be issued to search such premises for the said property, and to bring the same, if found, and the person in whose possession the same is found, before the said court (or, before the .... court for .... county), to be dealt with according to law.

(Signed) A. B.

Subscribed and sworn to before me this .... day of ....., 19...

...., Judge of the .... Court.

STATE OF WISCONSIN,
.... County.

SEARCH WARRANT.

In the .... court of the .... of ....

THE STATE OF WISCONSIN, To the sheriff or any constable or any peace officer of said county:

Whereas, A. B. has this day complained (in writing) to the said court upon oath that on the .... day of ...., A. D., 19.., in said county, in and upon certain premises in the (city, town or village) of .... in said county, occupied by .... and more particularly described as follows: (describe the premises) there are now located and concealed certain things, to wit: (describe the things to be searched for) (possessed for the purpose of evading or violating the laws of the state of Wisconsin and contrary to section .... of the Wisconsin statutes) (or, which things were stolen from their true owner, in violation of section .... of the Wisconsin statutes) (or which things were used in the commission of (or, may constitute evidence of) a crime, to wit: (describe crime) committed in violation of section .... of the Wisconsin statutes) and prayed that a search warrant be issued to search said premises for said property.

Now, therefore, in the name of the state of Wisconsin you are commanded forthwith to search the said premises for said things, and if the same or any portion thereof are found, to bring the same and the person in whose possession the same are found, and return this warrant within 48 hours before the said court (or, before the .... court for .... county), to be dealt with according to law.

Dated this .... day of ...., 19..

...., Judge of the .... Court.

INDORSEMENT ON WARRANT

Received by me ...., 19.., at .... o'clock ....M.

...., Sheriff (or peace officer)

RETURN OF OFFICER

State of Wisconsin
.... Court,
.... County.

I hereby certify that by virtue of the within warrant I searched the within named premises and found the following things: (describe things seized) and have the same now in my possession subject to the direction of the court.

Dated this .... day of ...., 19..

...., Sheriff (or peace officer)

968.24 Temporary questioning without arrest. After having identified himself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of his conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Suspicious behavior of driver and passenger justified detention. State v. Goebel, 103 W (2d) 203, 307 NW (2d) 915 (1981).

968.25 Search during temporary questioning. When a law enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or another is in danger of physical injury, he may search such person for weapons or any instrument or article or substance readily capable of causing physical injury and of a sort not ordinarily carried in public places by law abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, or which may constitute a threat to his safety, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest the person so questioned.

Investigatory stop-and-frisk for sole purpose of discovering suspect's identity was lawful under facts of case. State v. Flynn, 92 W (2d) 427, 285 NW (2d) 710 (1979).

968.255 Strip searches. (1) In this section:

(a) "Detained" means any of the following:

1. Arrested for any felony.

2. Arrested for any misdemeanor under s. 167.30, 940.19, 941.20 (1), 941.22, 941.23 or 941.24.

3. Taken into custody under s. 48.19 and there are reasonable grounds to believe the child has committed an act which if committed by an adult would be covered under subd. 1 or 2.

4. Arrested for any misdemeanor not specified in subd. 2, any other violation of state law punishable by forfeiture or any local ordinance if there is probable cause to believe the person is concealing a weapon or a thing which may constitute evidence of the offense for which he or she is detained.

(b) "Strip search" means a search in which a detained person's genitals, pubic area, buttock or anus, or a detained female person's breast, is uncovered and either is exposed to view or is touched by a person conducting the search.

(2) No person may be the subject of a strip search unless he or she is a detained person and if:

(a) The person conducting the search is of the same sex as the person detained, unless the search is a body cavity search conducted under sub. (3);

(b) The detained person is not exposed to the view of any person not conducting the search;

(c) The search is not reproduced through a visual or sound recording;

(d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or his or her designee, unless there is probable cause to believe that the detained person is concealing a weapon; and

(e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the person detained.

(3) No person other than a physician, physician's assistant or registered nurse licensed to practice in this state may conduct a body cavity search.

(4) A person who intentionally violates this section may be fined not more than $1,000 or imprisoned not more than 90 days or both.

(5) This section does not limit the rights of any person to civil damages or injunctive relief.

(6) A law enforcement agency, as defined in s. 165.83 (1) (b), may promulgate rules concerning strip searches which at least meet the minimum requirements of this section.

(7) This section does not apply to a search of any person who:

(a) Is serving a sentence, pursuant to a conviction, in a jail, state prison or house of correction.

(b) Is placed in or transferred to a secured correctional facility.

(c) Is committed, transferred or admitted under ch. 51, 971 or 975.

History: 1979 c. 240; 1981 c. 297.

Intrusive searches of the mouth, nose or ears are not covered by (3). However, searches of those body orifices should be conducted by medical personnel to comply with 4th and 5th amendments. OAG 5-82.

968.256 Search of physically disabled person. (1) In this section, "physically disabled person" means a person who requires an assistive device for mobility, including, but not limited to, a wheelchair, brace, crutch or artificial limb.

(2) A search of a physically disabled person shall be conducted in a careful manner. If a search of a physically disabled person requires the removal of an assistive device or involves a person lacking sensation in some portion of his or her body, the search shall be conducted with extreme care by a person who has had training in handling physically disabled persons.

History: 1979 c. 240.

968.26 John Doe proceeding. If a person complains to a judge that he has reason to believe that a crime has been committed within his jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but such counsel shall not be allowed to examine his client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, the record of such proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

A defendant must be allowed to use testimony of witnesses at a secret John Doe proceeding to impeach the same witnesses at the trial, even if the prosecution does not use the John Doe testimony. Myers v. State, 60 W (2d) 248, 208 NW (2d) 311.

Immunity hearing must be in open court. State ex rel. Newspapers, Inc. v. Circuit Court, 65 W (2d) 66, 221 NW (2d) 894.

Person charged as result of John Doe proceeding has no recognized interest in the maintenance of secrecy in that proceeding. John Doe discussed. State v. O'Connor, 77 W (2d) 261, 252 NW (2d) 671.

No restrictions of the 4th and 5th amendments preclude enforcement of an order for handwriting exemplars directed by presiding judge in John Doe proceeding. State v. Doe, 78 W (2d) 161, 254 NW (2d) 210.

See note to Art. I, sec. 8, citing Ryan v. State, 79 W (2d) 83, 255 NW (2d) 910.

This section does not violate constitutional separation of powers doctrine. John Doe discussed. State v. Washington, 83 W (2d) 808, 266 NW (2d) 597 (1978).

Balance between public's right to know and need for secrecy in John Doe proceedings discussed. In re Wis. Family Counseling Services v. State, 95 W (2d) 670, 291 NW (2d) 631 (Ct. App. 1980).

968.27 Definitions. As used in ss. 968.28 to 968.33:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a public utility in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications.

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device.

(3m) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facilities, or any component thereof, which is:

1. Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or

2. Being used by a communications carrier in the ordinary course of its business, or by a law enforcement officer in the ordinary course of his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(4) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to 968.33, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

(5) "Contents" when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport or meaning of that communication.

(6) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(7) "Judge" means the judge sitting at the time an application is made under s. 968.30 or his successor.

History: 1971 c. 40 s. 93.

Constitutionality of 968.27 to 968.30 upheld. State ex rel. Hussong v. Froelich, 62 W (2d) 577, 215 NW (2d) 390.

968.28 Application for court order to intercept communications. The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire or oral communications. The chief judge may under s. 968.30 grant an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense for which the application is made. The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, commercial gambling, bribery, extortion and dealing in controlled substances or any conspiracy to commit any of the foregoing offenses.

History: 1971 c. 219; 1977 c. 449.

968.29 Authorization for disclosure and use of intercepted wire or oral communications. (1) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.33 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer only to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.33 or 18 USC 2510 to 2520, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents only to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by ss. 968.28 to 968.33 or 18 USC 2510 to 2520 or by a like statute of any other state, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.33, may disclose the contents of that communication or such derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, ss. 968.28 to 968.33 or 18 USC 2510 to 2520, shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized, intercepts wire or oral communications relating to offenses other than those specified in

the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and (2). Such contents and any evidence derived therefrom may be used under sub. (3) when authorized or approved by the judge who acted on the original application where such judge finds on subsequent application, made as soon as practicable but no later than 48 hours, that the contents were otherwise intercepted in accordance with ss. 968.28 to 968.33 or 18 USC 2510 to 2520 or by a like statute.

History: 1971 c. 40 ss. 91, 93.

Evidence of intercepted oral or wire communications can be introduced only if the interception was authorized under 968.30; consent by one party to the communication is not sufficient. State ex rel. Arnold v. County Court, 51 W (2d) 434, 187 NW (2d) 354.

Although one-party consent tapes are lawful, they are not "authorized by 968.28 to 968.33" and therefore the contents cannot be admitted as evidence in chief, but 968.29 (3) does not prohibit giving such tapes to the state. State v. Waste Management of Wisconsin, Inc. 81 W (2d) 555, 261 NW (2d) 147.

Since interception by government agents of informant's telephone call was exclusively done by federal agents and was lawful under federal law, Wisconsin law did not govern its admissibility into evidence in a federal prosecution notwithstanding that the telephone call may have been a privileged communication under Wisconsin law. United States v. Beni, 397 F Supp. 1086.

968.30 Procedure for interception of wire or oral communications. (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to the court and shall state the applicant's authority to make such application and may be upon personal knowledge or information and belief. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officers authorizing the application.

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including:

1. Details of the particular offense that has been, is being, or is about to be committed;

2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

3. A particular description of the type of communications sought to be intercepted; and

4. The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) A full and complete statement whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications for the same type will occur thereafter.

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the court on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(3) Upon such application the court may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications, if the court determines on the basis of the facts submitted by the applicant that all of the following exist:

(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in s. 968.28.

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(c) Other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities which, or the place where au-

thority to intercept is granted and the means by which such interceptions shall be made;

(c) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(d) The identity of the agency authorized to intercept the communications and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with sub. (1) and the court making the findings required by sub. (3). The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than 30 days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in 30 days.

(6) Whenever an order authorizing interception is entered pursuant to ss. 968.28 to 968.33, the order may require reports to be made to the court which issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court requires.

(7) (a) The contents of any wire or oral communication intercepted by any means authorized by ss. 968.28 to 968.33 shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire or oral communication shall be filed with the court issuing such order and the court shall order the same to be sealed. Custody of the recordings and records shall be wherever the judge handling the application shall order. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be properly kept and preserved for 10 years. Duplicate recordings and other records may be made for use or disclosure pursuant to the provisions for investigations under s. 968.29 (1) and (2). The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under s. 968.29 (3).

(b) Applications made and orders granted under ss. 968.28 to 968.33 together with all other papers and records in connection therewith shall be ordered sealed by the court. Custody of the applications, orders and other papers and records shall be wherever the judge shall order. Such applications and orders shall be disclosed only upon a showing of good cause before the judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(c) Any violation of this subsection may be punished as contempt of court.

(d) Within a reasonable time but not later than 90 days after the filing of an application for an order of approval under par. (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served on the persons named in the order or the application and such other parties to intercepted communications as the judge determines is in the interest of justice, an inventory which shall include notice of:

1. The fact of the entry of the order or the application.

2. The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application.

3. The fact that during the period wire or oral communications were or were not intercepted.

(e) The judge may, upon the filing of a motion, make available to such person or his counsel for inspection in the manner provided in ss. 19.35 and 19.36 such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the issuing judge the serving of the inventory required by this subsection may be postponed. The judge shall review such postponement at the end of 60 days and good cause shall be shown prior to further postponement.

(8) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state unless each party, not less than 10 days before the trial,

hearing or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This 10-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(9) (a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that 1) the communication was unlawfully intercepted; 2) the order of authorization or approval under which it was intercepted is insufficient on its face; or 3) the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of ss. 968.28 to 968.33. The judge may, upon the filing of such motion by the aggrieved person, make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(b) In addition to any other right to appeal, the state shall have the right to appeal:

1. From an order granting a motion to suppress made under par. (a) if the attorney general or district attorney certifies to the judge or other official granting such motion that the appeal is not entered for purposes of delay and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court adopts; or

2. From an order denying an application for an order of authorization or approval, and such an appeal shall be ex parte and shall be in camera in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

(10) Nothing in ss. 968.28 to 968.33 shall be construed to allow the interception of any wire or oral communication between an attorney and a client.

History: 1971 c. 40 s. 93; 1981 c. 335 s. 26.

968.31 Interception and disclosure of wire or oral communications prohibited. **(1)** Except as otherwise specifically provided in ss. 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than $10,000 or imprisoned not more than 5 years or both:

(a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire or oral communication;

(b) Intentionally uses, attempts to use or procures any other person to use or attempt to use any electronic, mechanical or other device to intercept any oral communication;

(c) Discloses, or attempts to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this section or under circumstances constituting violation of this section;

(d) Uses, or attempts to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this section or under circumstances constituting violation of this section; or

(e) Intentionally discloses the contents of any oral or wire communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

(f) Intentionally alters any wire or oral communication intercepted on tape, wire or other device.

(2) It is not unlawful under ss. 968.28 to 968.33:

(a) For an operator of a switchboard, or an officer, employe or agent of any telephone public utility, whose facilities are used in the transmission of a wire communication to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication, but telephone public utilities shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) For a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(c) For a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or

where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) Any person whose wire or oral communication is intercepted, disclosed or used in violation of ss. 968.28 to 968.33 shall 1) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, such communication, and 2) be entitled to recover from any such person:

1. Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

2. Punitive damages; and

3. A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Good faith reliance on a court order or on s. 968.30 (7) shall constitute a complete defense to any civil or criminal action brought under ss. 968.28 to 968.33.

History: 1971 c. 40 ss. 92, 93; 1977 c. 272.

Testimony of undercover police officer carrying a concealed eavesdropping device under (2) is not the product of such eavesdropping and is admissible even assuming the eavesdropping was unconstitutional. State v. Smith, 72 W (2d) 711, 242 NW (2d) 184.

The use of the "called party control device" by the communications common carrier to trace bomb scares and other harassing telephone calls would not violate any law if used with the consent of the receiving party. 60 Atty. Gen. 90.

968.32 Forfeiture of contraband devices. Any electronic, mechanical, or other intercepting device used in violation of s. 968.31 (1) may be seized as contraband by any peace officer and forfeited to this state in an action by the department of justice under ch. 778.

History: 1979 c. 32 s. 92 (8).

968.33 Reports concerning intercepted wire or oral communications. In January of each year, the department of justice shall report to the administrative office of the United States courts such information as is required to be filed by 18 USC 2519. A duplicate copy of the reports shall be filed, at the same time, with the office of the director of state courts.

History: 1973 c. 12 s. 37; 1977 c. 187 s. 135; Sup. Ct. Order, 88 W (2d) xiii.