CHAPTER 970

CRIMINAL PROCEDURE — PRELIMINARY PROCEEDINGS

Cross–reference: See definitions in s. 967.02.

970.01 Initial appearance before a judge. (1) Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed. The person may waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audiovisual means under s. 967.08. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction.

(2) When a person is arrested without a warrant and brought before a judge, a complaint shall be filed forthwith.

History: Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 403.

Judicial Council Note, 1988: Sub. (1) is amended to authorize the arrested person to waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audio–visual means. [Re Order effective Jan. 1, 1988]

It is not unreasonable to detain a person arrested on Saturday after the courthouse is closed until his arraignment Monday morning. Kain v. State, 48 W (2d) 212, 179 NW (2d) 777.

Where defendant confessed to 8 robberies within one half hour after arrest in the early morning and was not taken before a judge until the next day, the period of detention was not unreasonable. Quinn v. State, 50 W (2d) 101, 183 NW (2d) 64.

The fact that a defendant confesses between the time of arrest and appearance before a magistrate does not prove that the delay was unreasonable. Pinczkowski v. State, 51 W (2d) 249, 186 NW (2d) 203.

Where defendant was taken to jail in the evening on suspicion of murder, and questioning resumed at 8:30 the next morning and continued at intervals until 9:50 that evening, after defendant was given the warning and said he did not want an attorney, a delay until the following morning in taking him to court was not unreasonable, since the police needed time to check out various information supplied by defendant and others. State v. Hunt, 53 W (2d) 734, 193 NW (2d) 858.

A delay in taking defendant before a magistrate from Saturday noon to Monday afternoon was justified when caused by attempts to locate witnesses and giving a lie detector test requested by defendant. State v. Wallace, 59 W (2d) 66, 207 NW (2d) 855.

See note to 971.04, citing State v. Neave, 117 W (2d) 359, 344 NW (2d) 181 (1984).

The interval between an arrest and an initial appearance is never unreasonable where the arrested suspect is already in the lawful physical custody of the state. State v. Harris, 174 W (2d) 367, 497 NW (2d) 742 (Ct. App. 1993).

Rule that a judicial determination of probable cause must be made within 48 hours of a warrantless arrest applies to Wisconsin; failure to comply did not require suppression of evidence not obtained because of the delay where probable cause for arrest was present. State v. Koch, 175 W (2d) 684, 499 NW (2d) 153 (1993).

Failure to conduct a probable cause hearing within 48 hours of arrest is not a jurisdictional defect and not grounds for dismissal with prejudice or voiding of a subsequent conviction unless the delay prejudiced the defendant's right to present a defense. State v. Golden, 185 W (2d) 763, 519 NW (2d) 659 (Ct. App. 1994).

Determination of probable cause made within 48 hours of warrantless arrest generally meets promptness requirement; if hearing is held more than 48 hours following arrest the burden shifts to the government to demonstrate emergency or extraordinary circumstances. County of Riverside v. McLaughlin, 500 US 44, 114 LEd 2d 49 (1991).

970.02 Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

(a) Of the charge against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

(b) Of his or her right to counsel and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.

(c) That the defendant is entitled to a preliminary examination if charged with a felony in any complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, unless waived in writing or in open court, or unless the defendant is a corporation or limited liability company.

(2) The judge shall admit the defendant to bail in accordance with ch. 969.

(3) Upon request of a defendant charged with a misdemeanor, the judge shall immediately set a date for the trial.

(4) A defendant charged with a felony may waive preliminary examination, and upon the waiver, the judge shall bind the defendant over for trial.

(5) If the defendant does not waive preliminary examination, the judge shall forthwith set the action for a preliminary examination under s. 970.03.

(6) In all cases in which the defendant is entitled to legal representation under the constitution or laws of the United States or this state, the judge or magistrate shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under s. 977.07 (1).

(7) If the offense charged is one specified under s. 165.83 (2) (a), the judge shall determine if the defendant's fingerprints, photographs and other identifying data have been taken and, if not, the judge shall direct that this information be obtained.

History: 1973 c. 45; 1975 c. 39; 1977 c. 29, 449; 1979 c. 356; 1981 c. 144; 1987 a. 151; 1993 a. 112, 486.

There is no need to appoint both a guardian ad litem and defense counsel unless it appears that prejudice would result from dual representation. Gibson v. State, 47 W (2d) 810, 177 NW (2d) 912.

970.03 Preliminary examination. (1) A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. A preliminary examination may be held in conjunction with a bail revocation hearing under s. 969.08 (5) (b), but separate findings shall be made by the judge relating to the preliminary examination and to the bail revocation.

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of $500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(3) A plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof.

(4) (a) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05 or 948.06, the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others considered by the court to be supportive of the complainant or defendant, the service representative, as defined in s. 895.73 (1) (c), or other persons required to attend, if the court finds that the state or the

defendant has established a compelling interest that would likely be prejudiced if the persons were not excluded. The court may consider as a compelling interest, among others, the need to protect a complainant from undue embarrassment and emotional trauma.

(b) In making its order under this subsection, the court shall set forth specific findings sufficient to support the closure order. In making these findings, the court shall consider, and give substantial weight to, the desires, if any, of the complainant. Additional factors that the court may consider in making these findings include, but are not limited to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family.

(c) The court shall make its closure order under this subsection no broader than is necessary to protect the compelling interest under par. (a) and shall consider any reasonable alternatives to full closure of the entire hearing.

(5) All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross–examine witnesses against the defendant, and may call witnesses on the defendant's own behalf who then are subject to cross–examination.

(6) During the preliminary examination, the court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(7) If the court finds probable cause to believe that a felony has been committed by the defendant, it shall bind the defendant over for trial.

(8) If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action.

(9) If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith.

(10) In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information filed pursuant to ch. 971. Section 970.04 shall apply to any dismissed count.

(11) The court may admit a statement which is hearsay and which is not excluded from the hearsay rule under ss. 908.02 to 908.045 to prove ownership of property or lack of consent to entry to or possession or destruction of property.

(12) (a) In this subsection:

1. "Hospital" has the meaning designated in s. 50.33 (2).

2. "Local health department" has the meaning given in s. 250.01 (4).

(b) At any preliminary examination, a report of one of the crime laboratory's, the state laboratory of hygiene's, a federal bureau of investigation laboratory's, a hospital laboratory's or a local health department's findings with reference to all or any part of the evidence submitted, certified as correct by the attorney general, the director of the state laboratory of hygiene, the director of the federal bureau of investigation, the chief hospital administrator, the local health officer, as defined in s. 250.01 (5), or a person designated by any of them, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness.

(c) 1. Except as provided in subd. 2., at any preliminary examination in Milwaukee county a latent fingerprint report of the city of Milwaukee police department bureau of identification division's latent fingerprint identification unit, certified as correct by the police chief, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness except as provided in subd. 2.

2. Subdivision 1. applies only if the state provides the latent fingerprint report to the defendant's attorney at least 72 hours before the preliminary examination. If the state provides the report in this manner, subd. 1. applies unless the defendant's attorney notifies the unit, in writing, at least 24 hours before the preliminary examination that the defendant objects to the receipt of the report in the manner described under subd. 1. If the defendant's attorney provides this notification in this manner, the latent fingerprint report shall be received under subd. 1. only if the expert who made the findings is called as a witness.

(13) Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of a preliminary examination by telephone or live audio–visual means.

(14) (a) In this subsection, "child" means a person who is younger than 16 years old when the preliminary examination commences.

(b) At any preliminary examination, the court shall admit a videotape statement under s. 908.08 upon making the findings required under s. 908.08 (3). The child who makes the statement need not be called as a witness and, under the circumstances specified in s. 908.08 (5) (b), may not be compelled to undergo cross–examination.

History: 1975 c. 184; 1977 c. 449; 1979 c. 112, 332; 1985 a. 267; Sup. Ct. Order, 141 W (2d) xiii (1987); 1987 a. 332 s. 64; 1987 a. 403; Sup. Ct. Order, 158 W (2d) xvii (1990); 1991 a. 193, 276; 1993 a. 27, 98, 227, 486.

Judicial Council Note, 1990: [Re amendment of (13)] The right to confront one's accusers does not apply to the preliminary examination, and since credibility is not an issue, demeanor evidence is of less significance than at trial. For these reasons, a party should not be permitted to prevent the admission of telephone testimony, although the proponent of such evidence should bear the burden of showing good cause for its admission. [Re Order eff. 1–1–91]

While hearsay relied upon in support of a criminal complaint requires some basis for crediting its reliability whether the informants are named or not, that requirement is satisfied where the hearsay is based upon observation of the informants. State ex rel. Cullen v. Ceci, 45 W (2d) 432, 173 NW (2d) 175.

There is no obligation on the magistrate to conduct an investigation to verify the contents of a criminal complaint, for this is the duty of the state, and if the latter fails to put sufficient facts before the magistrate to show probable cause, the complaint must fail even though clews and leads that could provide such information are revealed therein. State ex rel. Cullen v. Ceci, 45 W (2d) 432, 173 NW (2d) 175.

At the preliminary defendant is entitled to cross–examine witnesses who identified him thereat and who also identified him at a lineup, because if the lineup was unfair the identification evidence might be suppressed. Hayes v. State, 46 W (2d) 93, 175 NW (2d) 625.

A ruling on admissibility of evidence at a preliminary hearing is not res adjudicata at the trial. Meunier v. State, 46 W (2d) 271, 174 NW (2d) 277.

A failure to comply with the procedural requirements of 954.05 (1), Stats. 1967, affects only the court's jurisdiction over the person and is waived by a guilty plea. Crummel v. State, 46 W (2d) 348, 174 NW (2d) 517.

It was not error for the magistrate and trial court to fail to sequester witnesses without motion by the defendant, especially in the absence of a showing of prejudice. Abraham v. State, 47 W (2d) 44, 176 NW (2d) 349.

A bind over is not invalid because the judge stated it was "for the purpose of accepting a plea". Dolan v. State, 48 W (2d) 696, 180 NW (2d) 623.

A defendant is not entitled to call witnesses for pretrial discovery or to shake the credibility of the state's witness. State v. Knudson, 51 W (2d) 270, 187 NW (2d) 321.

Where a defendant has been indicted by a grand jury he is not entitled to a preliminary examination. State ex rel. Welch v. Waukesha Co. Cir. Court, 52 W (2d) 221, 189 NW (2d) 417.

When the preliminary examination is not timely held, personal jurisdiction is lost, but when defendant on arraignment entered a plea he waived the defense. Armstrong v. State, 55 W (2d) 282, 198 NW (2d) 357.

Defense counsel should be allowed to cross–examine a state's witness to determine the plausability of the witness, but not to attack his general trustworthiness. Wilson v. State, 59 W (2d) 269, 208 NW (2d) 134.

Purpose of hearing under (1) is to determine whether any felony, whether charged or not, probably was committed. After bind over, prosecutor may charge any crime not wholly unrelated to transactions and facts adduced at preliminary examination. Wittke v. State ex rel. Smith, 80 W (2d) 332, 259 NW (2d) 515.

Appellate review of preliminary hearing is limited to determination whether record contains competent evidence to support the examining magistrate's exercise of judgment. Although motive is not element of any crime and does not of itself establish guilt or innocence, evidence of motive may be given as much weight as fact finder deems it entitled to at preliminary hearing or trial. State v. Berby, 81 W (2d) 677, 260 NW (2d) 798.

Section 970.03 (8) neither limits prosecutor's discretion to prosecute under 59.47 nor prohibits second examination under 970.04. State v. Kenyon, 85 W (2d) 36, 270 NW (2d) 160 (1978).

This section does not require that proof of exact time of offense be shown. State v. Sirisun, 90 W (2d) 58, 279 NW (2d) 484 (Ct. App. 1979).

See note to 902.01, citing State ex rel. Cholka v. Johnson, 96 W (2d) 704, 292 NW (2d) 835 (1980).

See note to 971.01, citing State v. Hooper, 101 W (2d) 517, 305 NW (2d) 110 (1981).

Accused does not have constitutional right to closing argument at preliminary examination. State ex rel. Funmaker v. Klamm, 106 W (2d) 624, 317 NW (2d) 458 (1982).

If any reasonable inference supports conclusion that defendant probably committed a crime, magistrate must bind over defendant. State v. Dunn, 117 W (2d) 487, 345 NW (2d) 69 (Ct. App. 1984); aff'd 121 W (2d) 389, 359 NW (2d) 151 (1984).

State has right to appeal dismissal when it believes error of law was committed. Uncorroborated confession alone was sufficient to support probable cause finding. State v. Fry, 129 W (2d) 301, 385 NW (2d) 196 (Ct. App. 1985).

Mandatory closure of hearing solely at request of complaining witness over objection of defendant violates right to public trial. Stevens v. Manitowoc Cir. Ct., 141 W (2d) 239, 414 NW (2d) 832 (1987).

If appellate court stays trial court proceedings on interlocutory appeal, (2) does not set a mandatory time limit for the preliminary hearing upon remittitur. State v. Horton, 151 W (2d) 250, 445 NW (2d) 46 (Ct. App. 1989).

Unconstitutionally obtained confession may be admitted and serve as sole basis for bindover at preliminary examination. State v. Moats, 156 W (2d) 74, 457 W (2d) 299 (1990).

Defendant claiming error at preliminary examination may obtain relief only prior to trial; defendant may seek interlocutory review from court of appeals under 809.50. State v. Webb, 160 W (2d) 622, 467 NW (2d) 108 (1991).

Adjourning a preliminary examination for cause is within court's discretion. State v. Selders, 163 W (2d) 607, 472 NW (2d) 526 (Ct. App. 1991).

A court commissioner's determinations of admissibility of evidence will be upheld absent an erroneous exercise of discretion; the reviewing court then determines whether if believed the evidence would permit a reasonable magistrate to conclude the defendant probably committed the crime. State v. Lindberg, 175 W (2d) 332, NW (2d) (Ct. App. 1993).

Where a bindover decision is made by a court commissioner or circuit judge, review must be by a motion to dismiss brought in circuit court. Habeas corpus is not available to review a bindover. Dowe v. Waukesha County Circuit Ct. 184 W (2d) 724, 516 NW (2d) 714 (1994).

Sub. (10) requires the dismissal of any count in a multi–count complaint for which no probable cause is found at the preliminary hearing. State v. Williams, 186 W (2d) 506, 520 NW (2d) 920 (Ct. App. 1994).

970.032 Preliminary examination; child accused of committing assault or battery in a secured correctional facility. (1) Notwithstanding s. 970.03, if a preliminary examination is held regarding a child who is accused of violating s. 940.20 (1) or 946.43 while placed in a secured correctional facility, as defined in s. 48.02 (15m), the court shall first determine whether there is probable cause to believe that the child has committed a violation of s. 940.20 (1) or 946.43 while placed in a secured correctional facility, as defined in s. 48.02 (15m). If the court does not make that finding, the court shall order that the child be discharged but proceedings may be brought regarding the child under ch. 48.

(2) If the court finds probable cause as specified in sub. (1), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under ch. 48. The court shall retain jurisdiction unless the court finds all of the following:

(a) That, if convicted, the child could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under ch. 48 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the child or other children from committing violations of s. 940.20 (1) or 946.43 or other similar offenses while placed in a secured correctional facility, as defined in s. 48.02 (15m).

History: 1993 a. 98.

970.035 Preliminary examination; child younger than 16 years old. Notwithstanding s. 970.03, if a preliminary examination under s. 970.03 is held regarding a child who was waived under s. 48.18 for a violation which is alleged to have occurred prior to his or her 16th birthday, the court may bind the child over for trial only if there is probable cause to believe that a crime under s. 940.01 has been attempted or committed, that a crime under s. 161.41 (1), 940.02, 940.05, 940.06, 940.225 (1), 940.305, 940.31 or 943.10 (2) has been committed or that a crime that would constitute a felony under ch. 161 or under chs. 939 to 948 if committed by an adult has been committed at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9). If the court does not make any of those findings, the court shall order that the child be discharged but proceedings may be brought regarding the child under ch. 48.

History: 1987 a. 27; 1993 a. 98.

970.04 Second examination. If a preliminary examination has been had and the defendant has been discharged, the district attorney may file another complaint if the district attorney has or discovers additional evidence.

History: 1993 a. 486.

Where the state has no additional new or unused evidence upon which to base a second complaint, preliminary examination order discharging defendant is appealable. Wittke v. State ex rel. Smith, 80 W (2d) 332, 259 NW (2d) 515.

Where first preliminary examination became chaotic, prosecution properly abandoned the proceedings before presenting all evidence and reissued the complaint. State v. Brown, 96 W (2d) 258, 291 NW (2d) 538 (1980).

State was not barred from recharging defendant, whether or not it had new evidence. State v. Hoffman, 106 W (2d) 185, 316 NW (2d) 143 (Ct. App. 1982).

Complaint was properly reissued although evidence at second examination was identical to evidence at first examination, because judge did not consider evidence at first examination. State v. Twaite, 110 W (2d) 214, 327 NW (2d) 700 (1983).

970.05 Testimony at preliminary examination. The testimony at the preliminary examination shall be transcribed if requested by the district attorney or the defendant or ordered by the judge to whom the trial is assigned. The reporter shall file such transcript with the clerk within 10 days after it is requested. When a transcript is requested by someone other than the state public defender or a private attorney appointed under s. 977.08, the county shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies. When a transcript is requested by the state public defender or by a private attorney appointed under s. 977.08, the state public defender shall pay the cost of the original from the appropriation under s. 20.550 (1) (f) and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

History: 1993 a. 437.

Counsel is not entitled to a free copy of the transcript if the original is reasonably available for his use. State v. Schneidewind, 47 W (2d) 110, 176 NW (2d) 303.