

## CHAPTER 355.

## PROCEEDINGS BEFORE AND AT TRIAL.

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

**History:** 1951 c. 260.

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

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

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

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

[355.06 Stats. 1947 repealed by 1949 c. 631]

[355.07 Stats. 1947 repealed by 1949 c. 631]

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

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

[355.085 Stats. 1947 renumbered section 355.07 by 1949 c. 631]

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

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

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

evidence shall be so entertained, with waiver of jeopardy, when it appears that defendant is surprised by the state's possession of such evidence.

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

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

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

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

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

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

**History:** 1951 c. 674.

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

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

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

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

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

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

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

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

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

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

[355.16 Stats. 1947 repealed by 1949 c. 631]

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

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

**355.18 Preliminary examination; when a prerequisite to information.** No information shall be filed until the defendant has had a preliminary examination unless he waives such examination, except that informations may be filed without examination against fugitives from justice within the meaning of the constitution and laws of the United States and against corporations. The omission of a preliminary examination shall not invalidate any information unless the defendant moves to dismiss.

[355.19 Stats. 1947 repealed by 1949 c. 631]

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

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

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

STATE OF WISCONSIN, } In .... Court.  
 .... County, }  
 The State of Wisconsin,

v.

Name of defendant.

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

Dated ....., 19...

....., District Attorney

[355.22, 355.23 Stats. 1947 renumbered section 355.14 by 1949 c. 631]

**355.24 Murder and manslaughter.** It shall be sufficient in an indictment or information for murder to charge that the defendant did feloniously and with premeditation murder the deceased. In any indictment or information for manslaughter it shall be sufficient to charge that the defendant did feloniously slay the deceased.

[355.25 to 355.30 Stats. 1947 repealed by 1949 c. 631]

**355.31 Larceny, false pretenses, confidence game and embezzlement; pleading and evidence; subsequent prosecution.** In any case of larceny or of obtaining money or property by false personation or pretenses or by means of a confidence game, where 2 or more thefts of, or acts of obtaining, money or property belonging to the same owner have been committed pursuant to a single intent and design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts and acts of obtaining or misappropriations of money or property belonging to the owner may be prosecuted as a single crime. In the complaint, indictment or information it shall be sufficient to allege generally a larceny, obtaining or embezzlement of money to a certain amount or property to a certain value committed between certain dates, without specifying any particulars thereof. On the trial evidence may be given of any such larceny, obtaining or embezzlement committed on or between the dates alleged; and it shall be sufficient to maintain the charge and shall not be deemed a variance if it shall be proved that any money or property, of whatever amount or value, was so stolen, obtained or embezzled within the said period. But an acquittal or conviction in any such case shall not bar

a subsequent prosecution for any acts of larceny, obtaining or embezzlement concerning which no evidence was received at the trial of the original charge; and in case of a conviction on the original charge on a plea of guilty or nolo contendere, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of larceny, obtaining or embezzlement are included in the complaint, indictment or information and said conviction shall in that event not bar a subsequent prosecution for any other acts of larceny, obtaining or embezzlement.

**355.32 Larceny.** An indictment or information for larceny may contain a count for obtaining the same property by false tokens or pretenses, or a count for embezzlement thereof, and for receiving or concealing the property knowing it to have been stolen, and the jury may convict of either offense, and may find all or any of the persons indicted or informed against guilty of either of the crimes charged.

*[355.33 Stats. 1947 renumbered section 355.14 by 1949 c. 631]*

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

*[355.35 Stats. 1947 repealed by 1949 c. 631]*

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

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

*[355.38 Stats. 1947 repealed by 1949 c. 631]*

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

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

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