CHAPTER 974

CRIMINAL PROCEDURE—APPEALS, NEW TRIALS AND WRITS OF ERROR

Cross−reference: See definitions in s. 967.02.

974.01 Misdemeanor appeals. (1) Appeals in misdemeanor cases are to the court of appeals.

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

History: 1971 c. 298; Sup. Ct. Order, 67 W (2d) 585, 784 (1975); 1977 c. 187.

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

974.02 Appeals and postconviction relief in criminal cases. (1) A motion for postconviction relief other than under s. 974.06 by the defendant in a criminal case shall be made in the time and manner provided in ss. 809.30 and 809.40. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3), 809.30 and 809.40. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

(2) An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised.

History: 1971 c. 298; 1977 c. 187; 1977 c. 418 s. 929 (8m); 1979 c. 32; 1983 a. 27, 219.

Judicial Council Note, 1983: Sub. (1) is amended to repeal provisions relating to appeals under ch. 48, 51 or 55 cases. Those provisions have been relocated in their respective chapters for ease of reference. The subsection is also amended to clearly establish the time for bringing a postconviction motion other than under s. 974.06 and the manner for proceeding and the appeal times from a judgment of conviction, order denying a postconviction motion or both. Reference in sub. (1) to s. 809.30 is changed to s. 809.50 because the latter statute prescribes appropriate procedures for discretionary appeals while the former does not. [Bill 151−S]

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

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

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

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

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

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

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

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

Even claim of constitutional right will be deemed waived unless timely raised in trial court. Maclin v. State, 92 W (2d) 323, 284 NW (2d) 661 (1979).

Prerequisite to claim on appeal of ineffective trial representation is preservation of trial counsel's testimony at hearing in which representation is challenged. State v. Machner, 92 W (2d) 797, 285 NW (2d) 905 (Ct. App. 1979).

A defendant's escape during the pendency of post−conviction motions constituted a forfeiture of of the relief sought and dismissal of the motion with prejudice was appropriate. State v. Braun, 185 W (2d) 153, 516 NW (2d) 740 (1994).

A new trial based on new evidence may be granted only if it meets the 5 point test enumerated in this case. In addition where the evidence is a recantation by a witness, the recantation must be sufficiently corroborated by other newly discovered evidence. State v. Terrance J.W. 202 NW (2d) 497, 550 NW (2d) 445 (Ct. App. 1996).

By moving for new trial, defendant does not waive right to acquittal based on insufficiency of evidence. Burks v. United States, 437 US 1 (1978).

Failure to petition state supreme court for review precluded federal habeas corpus relief. Carter v. Gagnon, 495 F Supp. 878 (1980).

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

Confusion in the court−Wisconsin's harmless error rule in criminal appeals. 63 MLR 641 (1980).

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

974.05 State's appeal. (1) Within the time period specified by s. 808.04 (4) and in the manner provided for civil appeals under chs. 808 and 809, an appeal may be taken by the state from any:

(a) Final order or judgment adverse to the state, whether following a trial or a plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy.

(b) Order granting postconviction relief under s. 974.02 or 974.06.

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

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

1. Quashing an arrest warrant;
2. Suppressing evidence; or
3. Suppressing a confession or admission.

(2) If the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 809.10 (2) (b).

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

History: 1971 c. 298; Sup. Ct. Order, 67 W (2d) 585, 784 (1975); 1977 c. 187; 1983 a. 219; 1991 a. 39; 1993 a. 486.

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

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

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

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

Trial court's order specifying conditions of incarceration was neither judgment nor sentence under (1) (c). State v. Gibbons, 71 W (2d) 94, 237 NW (2d) 33.

Under 808.03 (2), both prosecution and defense may seek permissive appeal of nonfinal orders. State v. Rabe, 96 W (2d) 48, 291 NW (2d) 809 (1980).

Sub. (1) (d) 2 authorized state to appeal order suppressing defendant's oral statements. State v. Mendoza, 96 W (2d) 106, 291 NW (2d) 478 (1980).

Sub. (2) does not confine right of cross−appeal to final judgments or orders. State v. Alles, 106 W (2d) 368, 316 NW (2d) 378 (1982).

State may appeal as matter of right any pretrial order barring admission of evidence which might "normally" determine success of prosecution's case. State v. Eichman, 155 W (2d) 552, 456 NW (2d) 143 (1990).

974.06 Postconviction procedure. (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

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

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

(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Grant a prompt hearing.

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

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

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard under s. 807.13.

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

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

(8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

History: 1971 c. 40 s. 93; 1977 c. 29, 187, 418; 1981 c. 289; Sup. Ct. Order, 141 W (2d) xiii (1987); 1991 a. 253.

Judicial Council Note, 1981: Sub. (8) has been amended to reflect the fact that habeas corpus relief is now available in an ordinary action in circuit court. See s. 781.01, stats., and the note thereto and s. 809.51, stats. [Bill 613−A]

Judicial Council Note, 1988: Sub. (5) is amended to allow post−conviction motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

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

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

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

The sentencing judge is not disqualified from conducting a hearing on a postconviction motion to withdraw a guilty plea unless he has interjected himself in the plea bargaining to the extent he may become a material witness or otherwise disqualify himself. Rahhal v. State, 52 W (2d) 144, 187 NW (2d) 800.

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

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

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

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

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

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

When a defendant is informed that he might receive a maximum sentence of 20 years on an attempted murder charge and is then sentenced to 25 years, the sentence will be reduced to 20 years. Preston v. State, 58 W (2d) 728, 206 NW (2d) 619.

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

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

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

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

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

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

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

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

The necessity or desirability of the presence of defendant at a hearing on postconviction motions is a matter of discretion for the trial court and depends upon the existence of substantial issues of fact; hence, there was no abuse of discretion in denial of defendant's motion to be present at the hearing on his 974.06 motions where only

issues of law were raised and defense counsel had other opportunities to consult with his client. Sanders v. State, 69 W (2d) 242, 230 NW (2d) 845.

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

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

State courts do not have subject−matter jurisdiction over postconviction motion of federal prisoner not in custody under the sentence of a state court. State v. Theoharopoulos, 72 W (2d) 327, 240 NW (2d) 635.

See note to art. I, sec. 8, citing State v. North, 91 W (2d) 507, 283 NW (2d) 457 (Ct. App. 1979).

See note to art I, sec. 8, citing State v. Stawicki, 93 W (2d) 63, 286 NW (2d) 612 (Ct. App. 1979).

Issue considered on direct review cannot be reconsidered on motion under this section. Beamon v. State, 93 W (2d) 215, 286 NW (2d) 592 (1980).

This section does not supplant the writ of error coram nobis. Jessen v. State, 95 W (2d) 207, 290 NW (2d) 685 (1980).

Court had no jurisdiction under s. 974.06, 1979 stats., to hear challenge of computation of prisoner's good time; habeas corpus was proper avenue of relief. State v. Johnson, 101 W (2d) 698, 305 NW (2d) 188 (Ct. App. 1981).

Power of circuit court to stay execution of sentence for legal cause does not include power to stay sentence while collateral attack is being made on conviction by habeas corpus proceeding in federal court. State v. Shumate, 107 W (2d) 460, 319 NW (2d) 834 (1982).

Burden of proof under (6) is clear and convincing evidence. State v. Walberg, 109 W (2d) 96, 325 NW (2d) 687 (1982).

See note to Art. I, sec. 8, citing State v. Billings, 110 W (2d) 661, 329 NW (2d) 192 (1983).

See note to Art. I, sec. 7, citing State v. Lukasik, 115 W (2d) 134, 340 NW (2d) 62 (Ct. App. 1983).

Formal violation of 971.08 may not be remedied under this section. Motions under this section are limited to jurisdictional and constitutional matters. State v. Carter, 131 W (2d) 69, 389 NW (2d) 1 (1986).

While trial court's failure to submit lesser−included offense instruction to jury would probably result in reversal upon timely direct appeal, error is not of constitutional proportion entitling defendant to pursue relief under this section. State v. Nicholson, 148 W (2d) 353, 435 NW (2d) 298 (Ct. App. 1988).

Defendant challenging sentence on due process grounds based upon failure to receive copy of presentence investigation report is entitled to hearing only upon showing that the court had blanket policy of denial of access and policy was specifically applied to defendant, or that before sentencing plea defendant personally sought access and was denied it. State v. Flores, 158 W (2d) 636, 462 NW (2d) 899 (Ct. App. 1990).

Defendant's death did not moot 974.06 motion or appeal of its denial. State v. Witkowski, 163 W (2d) 985, 473 NW (2d) 512 (Ct. App. 1991).

Court should permit post sentencing withdrawal of guilty or no contest only to correct "manifest injustice". State v. Krieger, 163 W (2d) 241, 471 NW (2d) 599 (Ct. App. 1991).

Where a defendant is represented by the same attorney at trial and after conviction, the attorney's inability to assert his or her own ineffectiveness is a sufficient reason under sub. (4) for not asserting the matter in the original s. 974.06 motion. State v. Robinson, 177 W (2d) 46, 501 NW (2d) 831 (Ct. App. 1993).

When a defendant must be present for a postconviction evidentiary hearing, the use of a telephone hearing is not authorized. State v. Vennemann, 180 W (2d) 81, 508 NW (2d) 404 (1993).

A defendant is prohibited from raising a constitutional issue on s. 974.06 motion if the claim could have been raised in a previously filed s. 974.02 motion or a direct appeal. State v. Escalera−Naranjo, 185 W (2d) 169, 517 NW (2d) 157 (1994).

Generally new rules of law will not be applied retroactively to cases on collateral review under this section. State v. Horton, 195 W (2d) 280, 536 NW (2d) 155 (Ct. App. 1995).

Because individual has no underlying constitutional right to appointed counsel in state collateral postconviction proceedings, individual may not insist upon implementation of Anders v. California, 386 US 738 (1967) procedures. Pennsylvania v. Finley, 481 US 551 (1987).

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

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

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

Wisconsin postconviction remedies. 1970 WLR 1145.

Postconviction procedure; custody requirements. 1971 WLR 636.