



LEGAL UPDATE

City of Madison Police Department

Winter 2011

Captain Victor Wahl

Self Defense

Act 94, which becomes effective on December 20, changes Wisconsin law related to self defense. Widely referred to as the "Castle Doctrine," the law expands the circumstances under which a private citizen can legally utilize deadly force.

In short, the law now presumes that the use of deadly force is justified in additional situations:

- If the person against whom the force was used was in the citizen's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the citizen was present in the dwelling, motor vehicle, or place of business, and the citizen knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle or place of business.
- If the person against whom the force was used was in the process of unlawfully and forcibly entering the citizen's dwelling, motor vehicle, or place of business, the citizen was present in the dwelling, motor vehicle, or place of business, and the citizen knew or reasonably believed that an unlawful and forcible entry was occurring.

Other provisions of the self defense statute (939.48) remain unchanged.

The presumption does not apply in either of the following circumstances:

- If the citizen using force was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.
- If the person against whom the force was used was a public safety worker who entered or attempted to enter the citizen's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This limitation only applies if the public safety worker identified himself or herself to the citizen before the force was used, or if the citizen should know or should have reasonably known that the person entering or attempting to enter the dwelling, motor vehicle, or place of business was a public safety worker.

Note that "dwelling" as used in the statute includes any portion of a premises that is used as a home or place of residence, including the part of the lot on which the dwelling is located, as well as other structures on the immediate residential premises (including patios, fences, porches, garages, etc.).

"Place of business" as used in the statute is limited to a

business that the citizen using force owns or operates.

This change might increase the likelihood that private citizens will be using deadly force in homes or businesses, and officers should be aware of this potential when responding to incidents.

More importantly, officers must be cognizant of the potential for this statute to create a defense if deadly force is used against an officer. Officers must be aware of this when making any forcible or non-consensual entry to a dwelling, vehicle or business, and must take appropriate steps to insure they are adequately identified (in uniform or with clearly recognizable police identification, as well as verbal announcements and identification).

Concealed Carry Update

Act 35 became law on November 1st. As of mid-December, the Wisconsin Department of Justice had received more than 57,000 applications for concealed carry permits. More than 25,000 permits have been issued. A few updates on concealed carry issues:

Vehicles

One of the most confusing results of the law change relates to firearms in vehicles. Prior to Act 35, Wisconsin Courts had held that a firearm in a vehicle was "concealed" within the meaning of the CCW statute as long as it was not visible to the ordinary observation of a person outside the vehicle. In *State v. Walls*, 190 Wis. 2d 65 (1994) the Court of Appeals concluded that a handgun sitting on the front seat of a vehicle was indiscernible to the ordinary observation of a person outside and within the immediate vicinity of a vehicle, and was therefore "concealed." So, pre-Act 35, a firearm in a vehicle that was within the reach/control of a suspect and not visible to the ordinary observation of a person outside the vehicle would clearly constitute a CCW violation.

Wis. Stat. 167.31 previously prohibited transporting a firearm in a vehicle unless it was unloaded and encased. However, Act 35 and Act 51 have amended 167.31, so that it is now lawful to place, possess, or transport a handgun or an unloaded long gun in or on a vehicle. It is also lawful to load a handgun in a vehicle.

So, on the one hand we have the CCW statute (941.23) and *State v. Walls*, which stand for the proposition that a firearm in a vehicle that is within the reach/control of a driver or

occupant and is not ordinarily visible to those outside the vehicle is a violation of 941.23 (assuming the person does not hold a valid CCW permit). On the other hand we have 167.31 suggesting that it is lawful to possess or load a handgun in a vehicle.

Unfortunately, this contradiction makes dealing with handguns in vehicles tricky. A few thoughts on dealing with these situations:

- If the driver or occupant has a valid CCW permit, then they can clearly possess a handgun in a vehicle, concealed or not.
- If the handgun is not within the immediate reach/control of the driver or occupant, it seems clear that 941.23 would not apply and 167.31 permits the firearm to be in the vehicle.
- If the handgun is readily visible to public view 941.23 will not apply, even if the weapon is within the control of the driver or occupant.
- If the handgun is actually on the driver or occupant's person (tucked in a waistband, in a purse, etc.) and they are not a permit holder a CCW arrest seems clearly appropriate.
- If the handgun is not readily visible to the public, and is within the driver or occupant's control (but not on their person) try to do some additional investigation to determine the appropriate outcome. Can you establish a CCW violation on the part of the subject outside of the vehicle (coming or going to the car)? Is there other criminal activity involved? Does it appear the weapon is simply being transported?

Until these issues are clarified by Wisconsin Courts or by statutory changes, there will not be clear answers to these questions. The best approach might be to refrain from CCW arrests in these situations unless officers can establish that the person was carrying concealed outside of the vehicle (without a permit) or if there are other criminal violations involved.

MFD & ER Issues

Discussions have been continuing with the hospital emergency rooms and Madison Fire Department to address the potential for patients who are carrying firearms. Our primary concern during these discussions has been that MPD not be routinely asked to secure and collect weapons carried by patients that are conveyed by ambulance or end up at an emergency room.

MFD and the emergency rooms are prepared to deal with firearms in the possession of patients that are transported or admitted. However, MPD may be called to assist MFD or ER personnel under certain circumstances:

- To investigate potential criminal activity involving a patient armed with a firearm.
- To assist with armed patients who are uncooperative or acting erratically.
- To assist in rendering a weapon safe.

DOJ Information to Permit Holders

DOJ has finalized the pamphlet that it provides to those receiving CCW permits. It is helpful to review this document to understand the information being provided to all CCW permit holders. The pamphlet is attached to the end of this update.

Miranda

***J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); Decided June 16, 2011 by the United States Supreme Court.**

In *J.D.B.*, police were conducting a burglary investigation, and began to suspect J.D.B., a 13-year-old, seventh-grade student. The School Resource Officer (uniformed) removed J.D.B. from his social studies class, and escorted him to a school conference room. The door was closed, and J.D.B. was questioned for the next 30 to 45 minutes. The officer, a detective, an assistant principal and another school official were all present during the questioning. J.D.B. was not provided with *Miranda* warnings and was not informed that he was free to leave the room. J.D.B. eventually confessed that he and a friend had been responsible for the burglaries in question.

J.D.B. challenged the admissibility of his confession, arguing that his statement was obtained in violation of *Miranda*. *Miranda* warnings are required prior to any custodial interrogation. The questioning of J.D.B. was clearly interrogation, so the relevant question was whether he had been in custody for *Miranda* purposes at the time. Custody (for *Miranda* purposes) is defined as "formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Courts have consistently concluded that the custody inquiry is evaluated by an objective standard.

The issue in *J.D.B.* was whether the age of the person subject to questioning is relevant to the custody inquiry. Courts have consistently held that subjective intent is not relevant to the custody inquiry, nor are factors specific to the individual being questioned (such as the extent of their prior contact with police, etc.). The North Carolina Supreme Court concluded that J.D.B. had not been in custody at the time of the questioning, and that consideration of his age was expressly not part of the custody analysis.

The U.S. Supreme Court reversed the North Carolina Court, ruling that the age of a child does bear on whether he or she was in custody for *Miranda* purposes. The court indicated

that the inquiry was still an objective one: “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it is clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.” The court went on to state:

We hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.

While the *J.D.B.* case has been portrayed by some as significant, all it says is that the age of a juvenile being questioned is relevant to the custody determination. This doesn’t mean that juveniles will always be deemed to be in custody for *Miranda* purposes (the *J.D.B.* decision stated: “this is not to say that a child’s age will be a determinative, or even a significant, factor in every case”), and it is consistent with how officers make decisions in other situations involving juveniles (such as obtaining consent).

Notably, the *J.D.B.* court did not decide whether he had been in custody at the time of the questioning, sending the case back to the North Carolina State Courts to make this determination. No Wisconsin decision has ruled expressly on a situation like that in *J.D.B.*, but two recent Court of Appeals decisions did address custody in a school setting:

- In *In Re Dionicia M*, 329 Wis.2d 524 (Ct. App. 2010) an officer located a truant student a few blocks from school. The officer placed the female (a fifteen-year-old) student in the back seat of his squad (with doors locked) and conveyed her back to school. During the drive he asked her several questions about a previous battery incident. The court concluded that she had been in custody for *Miranda* purposes.
- In *State v. Schloegel*, 319 Wis. 2d 741 (Ct. App. 2009) officers responded to a school office, where a student had been pulled from class by school officials conducting an investigation into drug activity. The principal informed the student that they would be searching his vehicle (parked on school grounds), so the officers escorted the student to the parking lot where the principal searched the vehicle. The officers asked several questions during this time, and the court concluded that the student had not been in custody for *Miranda* purposes.

The trend in other states, however, is that many police interviews in school settings—particularly under circumstances like those in *J.D.B.*—are likely to be viewed as custody for *Miranda* purposes. Officers seeking to avoid a custodial situation should: limit the number of officers and school personnel involved in the interview; avoid interviews in closed or locked rooms; tell the student that he or she is free to go (if that is the case); have the student report to the office, or have school officials rather than an officer escort them; and limit the duration of the encounter.

Refusal Hearings

***State v. Anagnos*, 2011 WI App 118 (2011); Decided July 27, 2011 by the Wisconsin Court of Appeals.**

In *Anagnos*, a deputy observed a vehicle make a left turn without using a turn signal. The deputy made a traffic stop, and subsequently arrested the driver (*Anagnos*) for OMVWI. The deputy processed *Anagnos* for OMVWI, but *Anagnos* refused to submit to a chemical test. The State sought to revoke *Anagnos*’ driver’s license, and he requested a refusal hearing.

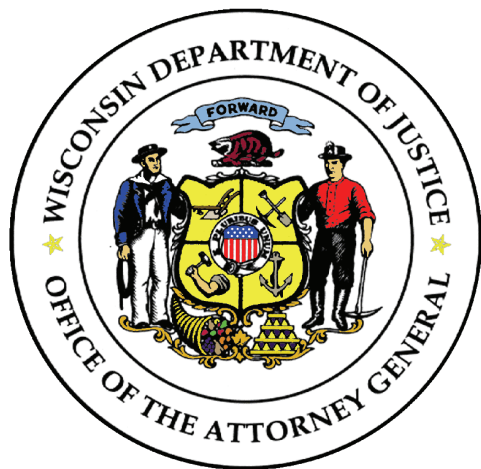
At the refusal hearing, *Anagnos* focused exclusively on whether the deputy had reasonable suspicion to stop him, arguing that since no other traffic was affected by his failure to use his turn signal it was not a traffic violation. The State disputed this, and also argued that it was inappropriate for the reasonable suspicion issue to be a topic of the refusal hearing.

The Court of Appeals first concluded that the deputy did not have reasonable suspicion to stop *Anagnos*. Wis. Stat. 346.34(1)(b) requires the use of a turn signal “in the event any other traffic may be affected by the movement...” At the time of the left turn, the only other vehicle present was the deputy’s squad, which was located in the far right-hand turn lane. The Court concluded that he could not have been affected by *Anagnos*’ failure to use his signal, and that therefore no violation of 346.34(1)(b) occurred. The Court also concluded that the deputy’s other observations did not give rise to reasonable suspicion that a traffic violation had occurred.

More significantly, the Court of Appeals concluded that it was appropriate for the Circuit Court to consider the lawfulness of the traffic stop at the refusal hearing. One of the permissible topics of a refusal hearing is whether the driver was lawfully placed under arrest for OMVWI. The Court concluded that the absence or presence of reasonable suspicion for the original traffic stop is a component of this. So, while the State is seeking to appeal the *Anagnos* decision, officers should be prepared to have the reasonable suspicion for their stop be an issue at refusal hearings.

Landlord Regulation

Act 108, signed into law on December 7, significantly impacts regulation of landlords. The statute prohibits municipalities from placing certain limitations on residential landlords. A local ordinance can no longer prohibit a landlord from considering income, occupation, rental history, credit information or arrest/conviction history when considering a prospective tenant. Madison has ordinances restricting landlords in some of these areas, and this statute will invalidate these ordinances.



This guide only summarizes the carrying of a concealed weapon with a license. Do not rely on the information in this brochure for non-license carry.

Information contained within this brochure is valid as of the revision date and may change pursuant to a change in Wisconsin statutes or administrative codes. For the most up-to-date information, please refer to the following websites:

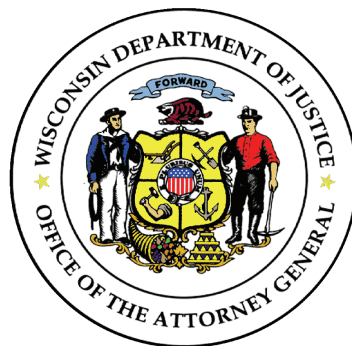
DOJ:
www.doj.state.wi.us

WI state statutes:
<http://legis.wisconsin.gov/rsb/stats.html>

Wisconsin
Department of Justice

Crime Information Bureau
Firearms Unit
P. O. Box 7130
Madison, WI 53707-7130

Phone: 608-266-7314



Concealed Weapons License Information

**WISCONSIN
DEPARTMENT OF
JUSTICE**

**J. B. VAN HOLLEN
ATTORNEY GENERAL**

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Firearm Safety

Everyone should learn the four fundamental rules of firearms safety and follow them at all times to prevent unsafe or unintentional firing.

1. Treat every gun as if it is loaded.
2. Always point the muzzle in a safe direction.
3. Be certain of your target and what's beyond.
4. Keep your finger outside of the trigger guard until you are ready to shoot.

A key component of firearm safety is maintaining control of the weapon. When you maintain control of the weapon you ensure it is not accessible to unauthorized users or children. Use a holster or carry system that securely retains your weapon to enhance your safety and the safety of those around you.

Law Enforcement Contact

The concealed carry law requires you to display your photo identification and concealed carry license upon the request of a law enforcement officer when you are carrying a concealed weapon. For your safety and the safety of the law enforcement officer, we recommend the following actions to avoid raising alarm in the officer and ensure the contact goes as smoothly as possible.

1. Cooperate fully with the officer.
2. If you are in a vehicle, roll down the window.
3. At night, turn on the dome light.
4. Stay in the vehicle unless the officer tells you to get out.
5. Keep your hands where the officer can see them. If you are in a vehicle, the best place to put them is on the steering wheel.
6. Immediately and calmly tell the officer that you have a concealed carry license and are carrying a weapon.

7. Tell the officer where your permit and weapon are located. Do not reach for them unless specifically told to by the officer. Don't make any quick movements.

In some circumstances the officer may ask to take temporary possession of the weapon to ensure the safety of the officer and others. However, in routine non-arrest contacts, the officer will return the weapon to you at the end of the contact.

Other State and Federal Property

Federal law applies to federal government property and locations. A Wisconsin concealed carry license does not necessarily authorize carry of a weapon on federal property.

A Wisconsin concealed carry license may or may not be accepted in other states. Each state has the power to regulate what nonresident permits it accepts. We suggest that you contact each state you intend to travel to for the most updated concealed carry regulations.

Prohibited Locations

You cannot carry a weapon in the following locations:

- Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of a division of criminal investigation special agent of the DOJ.
- Any portion of a building that is a prison, jail, house of correction, or secured correctional facility.
- The Sand Ridge Secure Treatment Center, the Wisconsin Resource Center, or any secured unit or secured portion of a mental health institution, including a facility designated as the Maximum Security Facility at the Mendota Mental Health Institute.
- Any portion of a building that is a county, state, or federal courthouse.
- Any portion of a building that is a municipal courtroom, if court is in session.
- A place beyond a security checkpoint in an airport.

School Grounds & Premises

As a concealed carry licensee, you may possess a firearm within 1,000 feet of the grounds of a school. However, it is a felony to possess a firearm in or on the grounds of a school unless you are within one of the narrowly defined statutory exceptions listed under s. 948.605 (2) (b). It is illegal to possess any other dangerous weapons (e.g. knife, taser, etc.) on school premises unless you are within one of the statutory exceptions listed under s. 948.61 (3).

A school is defined as a public school, parochial or private school, or tribal school, which provides an educational program for one or more grades between grades 1 and 12 and is commonly known as an elementary, middle, junior high, senior high or high school.

Taverns and Alcohol

A licensee may carry a concealed weapon in an establishment where alcohol is consumed or served only if you are not consuming alcohol on the premises, Sec. 941.237(3), Wis. Stats. It is a class A misdemeanor (9 months jail and/or \$10,000 fine) for any person, whether or not they are a licensee, to go armed with a firearm while under the influence of an intoxicant.

Employers

Employers may prohibit employees from carrying a concealed weapon on the job. That prohibition does not extend to a weapon kept in the employee's own motor vehicle, even if the vehicle is used for work purposes, or while parked on the employers lot.

Businesses

Businesses may prohibit people from carrying concealed weapons on their property. This prohibition does not extend to weapons kept in vehicles in parking areas. Notice can be verbal or via a sign posted in a prominent place near all of the entrances to the part of the building to which the restriction applies.

Residential and Non-residential Property

The owner of residential or non-residential property may prohibit anyone who is not an owner, lessee, or an occupant of the property from entering or remaining on the property while carrying a weapon. Notice can be verbal or via a sign posted in a prominent place near all of the entrances to the part of the building to which the restriction applies. This prohibition does not extend to weapons kept in vehicles in parking areas.

State and local governments and colleges and universities may prohibit the possession of weapons in public or privately owned buildings by posting a sign in the same manner as previously described. This prohibition does not extend to weapons kept in vehicles in parking areas.

The carrying of weapons on public land is generally permitted. However, there are many variables to concealed carry in buildings and on public and private land. Refer to Sec. 943.13, Wis. Stats. and the DNR website: www.dnr.state.wi.us for specific information.

If You Use Your Weapon in Self Defense

Ensure your safety and request medical assistance if needed, by calling 911 or asking a witness to do so. Law enforcement needs to be notified immediately if you use your weapon. Remain at a safe location on the scene and, unless you are facing an imminent threat, secure your weapon so arriving officers do not mistake you as a threat to them. It is important to remember that, regardless of your intent or actions, you must follow the directions of on-duty law enforcement officers, who must quickly analyze the situation, make a threat assessment, and initiate an investigation. Please keep both hands in plain view of the officers. You may be placed in temporary custody until law enforcement can secure the scene, make it safe, and determine what occurred. Comply with any request to be handcuffed and searched until the officer can sort out the circumstances surrounding the incident. Off-duty police officers involved in a shooting are handled in this same manner. Unless the investigating officers believe that you have acted unlawfully, you will not be arrested.

Suspension or Revocation of License: Any potential change to licensee eligibility may constitute grounds for suspension or revocation of a license to carry a concealed weapon. If a license is suspended or revoked, the licensee must return the license to the Department of Justice personally or by certified mail within seven (7) days of suspension or revocation.

Lost or Destroyed License: If a license is lost or destroyed, the licensee may obtain a replacement by submitting the appropriate form, available from the DOJ website, along with a \$12 fee and any remaining portions of the license to the Department of Justice. If the license has been lost, a new license number will be assigned.

Change of Address: The Department of Justice must be notified of a licensee's change of address within thirty (30) days of any such change.

Weapons Permitted with License: Sec. 175.60(1)(j), Wis. Stats.: "Weapon" means a handgun, an electric weapon, as defined in s. 941.295(1c)(a), a knife other than a switchblade knife under s. 941.24, or a billy club.