

# ADVISORY MEMORANDUM

# WISCONSIN DEPARTMENT OF JUSTICE

Date: April 20, 2009

To: Wisconsin District Attorneys, Deputy District Attorneys and Assistant District Attorneys

From: J.B. Van Hollen  
Attorney General

Subject: The Interplay Between Article I, § 25 Of The Wisconsin Constitution, The Open Carry Of Firearms And Wisconsin's Disorderly Conduct Statute, Wis. Stat. § 947.01

## Summary

¶1. Under Article I, § 25 of the Wisconsin Constitution, a person has the right to openly carry a firearm for any of the purposes enumerated in that Section, subject to reasonable regulation as discussed herein. The Wisconsin Department of Justice (the Department) believes that the mere open carrying of a firearm by a person, absent additional facts and circumstances, should not result in a disorderly conduct charge from a prosecutor.

## Discussion

¶2. The Department has a duty under Wis. Stat. § 165.25(3) to “[c]onsult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office.” We have received multiple inquiries from state prosecutors on the interplay between Article I, § 25, the open carry of firearms and Wisconsin’s disorderly conduct statute, Wis Stat. § 947.01.<sup>1</sup> In response, we offer this informal Advisory Memorandum<sup>2</sup> for your consideration. Please feel free to use it for law enforcement training within your jurisdictions.

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<sup>1</sup> The Department has also received requests from individuals and legislators for a formal Opinion of the Attorney General on the legality of openly carrying firearms in Wisconsin. We declined these requests, principally because (a) the individual requestors were not entitled to a formal opinion under Wis. Stat. §§ 59.42(1)(c), 165.015(1), or 165.25(3), and (b) the circumstances involved “an issue that [was] the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation.” 77 Op. Att’y Gen. Preface (1988), at 3.D. While we acknowledge the recent filing of a federal civil lawsuit pertaining to open carry in the Eastern District of Wisconsin—*Gonzalez v. Village of West Milwaukee, et al.*, No. 09-CV-384-LA—we note that the State of Wisconsin is not a party to this federal action. We further note that, as explained below, this informal Advisory Memorandum does not carry the same legal significance as a formal Opinion of the Attorney General on a matter of state law.

<sup>2</sup> This informal Advisory Memorandum does not constitute a formal opinion of the Wisconsin Attorney General or the Wisconsin Department of Justice under Wis. Stat. § 165.015(1). The Department offers this Advisory Memorandum for educational and informational purposes only. It does not prevent the Attorney General, the Wisconsin Department of Justice, or any Wisconsin district attorney, special prosecutor or municipal prosecutor from bringing any particular charge or making any particular argument in the course of litigation. It does not create any rights beyond those

¶3. As amended in 1998, the Wisconsin Constitution provides that “[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” Wis. Const. art. I, § 25. A Wisconsin citizen has a constitutionally protected right to openly carry a firearm for any of the enumerated purposes, absent the application of a reasonable regulation properly imposed as an exercise of police power. *See, e.g.*, Wis. Stat. § 941.29 (preventing certain classes of persons from possessing firearms); *State v. Thomas*, 2004 WI App 115, ¶ 16, 274 Wis. 2d 513, 683 N.W.2d 497 (“[T]he right to bear arms is a qualified right, subject to reasonable restrictions under the state’s police power”).<sup>3</sup>

¶4. In *State v. Schwebke*, 2002 WI 55, ¶ 24, 253 Wis. 2d 1, 644 N.W.2d 666 (footnote omitted), the Wisconsin Supreme Court established the contours of Wisconsin’s disorderly conduct statute:

Wisconsin Stat. § 947.01 . . . states as follows: “Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.” The State must prove two elements to convict a defendant under this statute. *State v. Douglas D.*, 2001 WI 47, ¶ 15, 243 Wis. 2d 204, 626 N.W.2d 725. “First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct.” *Id.* “Second, it must prove that the defendant’s conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance.” *Id.* An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others. *See State v. A.S.*, 2001 WI 48, ¶ 33, 243 Wis. 2d 173, 626 N.W.2d 712.

*See also State v. Maker*, 48 Wis. 2d 612, 616, 180 N.W.2d 707 (1970) (footnote omitted):

This court’s emphasis upon the relatedness of conduct and circumstances in the statute is no more than a recognition of the fact that what would constitute

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established under the constitutions, statutes, regulations and administrative rules of the United States of America and the State of Wisconsin.

<sup>3</sup> Prosecutors and law enforcement officers should bear in mind that, in addition to the felon-in-possession statute, other statutory limitations on possession of firearms remain in full force and effect. They apply to certain situations involving both open and concealed carry. *See, e.g.*, Wis. Stat. §§ 167.31 (specifying manner in which persons may lawfully use and transport firearms); 941.20 (endangering safety by use of dangerous weapon, various circumstances); 941.235 (carrying firearm in public building); 941.237 (carrying handgun where alcohol may be sold and consumed); 948.60 (possession of firearm by juveniles, with sporting exceptions); 948.605 (possession and use of firearms in school zones).

disorderly conduct in one set of circumstances, might not under some other. When a famed jurist observed, ‘The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,’ the comment related to the crowdedness of the theater as well as to the loudness of the shout. It is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation.

¶5. The decision to charge a defendant with disorderly conduct necessarily depends on the totality of the circumstances. Reasonableness, not bright-line rules, should guide your decision. *See, e.g., State v. Werstein*, 60 Wis. 2d 668, 671-72, 211 N.W.2d 437 (1973) (“Wisconsin’s disorderly conduct statute proscribes conduct in terms of results which can reasonably be expected therefrom, rather than attempting to enumerate the limitless number of anti-social acts which a person could engage in that would menace, disrupt or destroy public order”) (footnote omitted). Even when an act facially resembles the exercise of a protected right, the facts and circumstances of a case may give rise to a disorderly conduct charge. For example, the First Amendment of the United States Constitution and Article I, § 3 of the Wisconsin Constitution both protect the right to freedom of speech. Yet it has long been recognized that speech-only activity can cross the line between protected expression and disorderly conduct. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances”); *accord State v. Zwicker*, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969). *See also Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (noting that some categories of speech are “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest”).

¶6. Applying these principles to open carry matters, we recognize that under certain circumstances, openly carrying a firearm may contribute to a disorderly conduct charge. But this determination must take into account the constitutional protection afforded by Article I, § 25 of the Wisconsin Constitution. **The Department believes that mere open carry of a firearm, absent additional facts and circumstances, should not result in a disorderly conduct charge.** For example, a hunter openly carrying a rifle or shotgun on his property during hunting season while quietly tracking game should not face a disorderly conduct charge. But if the same hunter carries the same rifle or shotgun through a crowded street while barking at a passerby, the conduct may lose its constitutional protection. *See Werstein*, 60 Wis. 2d at 672-73 (collecting cases illustrating disorderly conduct) (“In each of these cases, convictions for being ‘otherwise disorderly’ resulted from *the inappropriateness of specific conduct because of the circumstances involved*”) (emphasis added).<sup>4</sup>

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<sup>4</sup> While *Werstein* preceded the adoption of Article I, § 25, we believe the emphasized principle still applies.

¶7. The same concepts should apply to handguns. The state constitutional right to bear arms extends to openly carrying a handgun for lawful purposes. As illustrated by a recent municipal court case in West Allis, a person openly carrying a holstered handgun on his own property while doing lawn work should not face a disorderly conduct charge.<sup>5</sup> If, however, a person brandishes a handgun in public, the conduct may lose its constitutional protection. Again, “[i]t is the combination of conduct and circumstances that is crucial in applying the [disorderly conduct] statute to a particular situation.” *Maker*, 48 Wis. 2d at 616.

¶8. Finally, several law enforcement agencies have asked whether, in light of Article I, § 25, they may stop a person openly carrying a firearm in public to investigate possible criminal activity, including disorderly conduct. We say yes. An officer may stop and briefly detain a person for investigative purposes (known as an investigative or *Terry* stop) if he has “reasonable suspicion,” based on articulable facts, of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The existence of reasonable suspicion depends on the totality of the circumstances, including the information known to the officer and any reasonable inferences to be drawn at the time of the stop. *United States v. Arvizu*, 544 U.S. 266 (2002) (reaffirming “totality of the circumstances” test). Even though open carry enjoys constitutional protection, it may still give rise to reasonable suspicion when considered in totality. It is not a shield against police investigation or subsequent prosecution. *See State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (police officers not required to first eliminate the possibility of innocent behavior before making investigatory stop).

¶9. And “even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, [and] ask to examine the individual's identification,” as long as the police do not convey a message that compliance is mandatory. *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). The Fourth Amendment does not prevent police from making voluntary or consensual contact with persons engaged in constitutionally protected conduct. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). Accordingly, a law enforcement officer does not violate the Fourth Amendment by approaching an individual in public and asking questions. *Florida v. Royer*, 460 U.S. 491, 497 (1983). An officer may approach and question someone as long as the questions, the circumstances and the officer's behavior do not convey to the subject that he must comply with the requests. *Bostick*, 501 U.S. at 435-36. The person approached need not answer any questions. As long as he or she remains free to walk away, there has been no intrusion on liberty requiring a particularized and objective Fourth Amendment justification. *See Mendenhall*, 446 U.S. at 554.

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<sup>5</sup> *See* Linda Spice, “West Allis Man Not Guilty In Open Carry Gun Case,” Milwaukee Journal-Sentinel, Feb. 17, 2009, online at < <http://www.jsonline.com/news/crime/39722082.html> > (last visited March 26, 2009).

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¶10. For further information on this subject, please feel free to contact Assistant Attorneys General Greg Weber at 608.266.3935, or Roy Korte at 608.267.1339.

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