

	KENOSHA POLICE DEPARTMENT		
	POLICY AND PROCEDURE		
	1.10 Search and Seizure		
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Action:	Selected excerpts taken from Wisconsin Law Enforcement Officers Criminal Law handbook and Wisconsin Department of Justice, law Enforcement Standards, Defensive and Arrest Tactics. Policy 1.14 Inventory Search of Motor Vehicles.		Number of pages: 10

I. PURPOSE

The purpose of this policy is to provide officers with the basic principles of search and seizure that will affect the admissibility of items seized into evidence.

II. POLICY

It is the policy of the Kenosha Police Department that officers conducting searches and seizures shall do so in accordance with Wisconsin law, the Constitution of the State of Wisconsin and the requirements set forth in the Constitution of the United States.

III. STATUTES

Officers should be familiar with the Wisconsin State Statutes that pertain to Search and Seizure, specifically the procedural requirements. The applicable statutes include but are not limited to: 968.10 thru 968.23.

IV. SEARCH

A search, as defined by the Wisconsin Supreme Court, is the looking into hidden places for contraband, instrumentalities of a crime, fruits of a crime, or evidence of a crime with the intent of charging the individual with an offense.

V. SEIZURE

Seizure of property is limited to contraband, instrumentalities of a crime, fruits of a crime or evidence of a crime. The Fourth Amendment to the Constitution provides individuals a high degree of protection from searches and seizures made by police officers. Searches and seizures carried out by officers without a warrant must be clearly justified by officers as falling into one of the well-defined exceptions to the Fourth Amendment warrant requirement. To avoid suppression of evidence and possible personal liability, officers should attempt to obtain a warrant whenever reasonably possible before instituting a search and/or a seizure.

VI. WHEN AUTHORIZED

Under Wisconsin law, the search of a person, object or place may be made, and things may be seized, when the search is made pursuant to sec. 968.10, Stats.

A. Incident to lawful arrest.

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- B. With consent.
- C. Pursuant to a valid search warrant.
- D. With the authority and within the scope of a lawful inspection.
- E. Pursuant to a search during an authorized temporary questioning as provided in sec. 968.25, Stats. [\(see 1.5 Stop and Frisk\)](#).
- F. As otherwise authorized by law.

Searches and seizures are also authorized when they are covered by the judicially recognized exceptions to the warrant requirement.

- A. Automobile-probable cause search (Carroll Doctrine)
- B. Inventory searches
- C. Exigent circumstances - hot pursuit
- D. Protective sweep
- E. Terry stop and frisk

There are also permissible searches, which do not involve the Fourth Amendment, when there is no expectation of privacy. These types of searches include:

- A. Open fields
- B. Abandoned property
- C. Dog sniffs in public places
- D. VIN numbers
- E. Open view
- F. Fly-over's

Whenever an officer discovers evidence while conducting a lawful search, the officer may seize the item under the plain view doctrine, provided that the following three factors are present:

- A. The item is in clear plain view.
- B. The item is obviously evidence or contraband.
- C. The officer is lawfully in the area where the discovery was made.

VII. WITH WARRANT

To obtain a search warrant the officer must present a complaint for warrant or an affidavit that provides sufficient information from which the judge may find probable cause to believe that the objects to be seized are at the place to be searched and are subject to lawful seizure. A warrant may be issued to search a specific person as well as a place or object. Additionally, while the same quantum of evidence is required to show probable cause such evidence must be recent in time. A lapse of days or even hours may be sufficiently stale as to prevent the issuance of a search warrant. It must be reasonable to infer from facts shown in the affidavit that the things are to be found at the place of search. Anticipatory warrants may be issued if the officer has shown the judge facts that the evidence will be at a location at some future time. See sec. 968.23, Stats. for a sample form of a search warrant.

A. *Requirements for a valid warrant*

To be valid, a search warrant must:

1. Be in writing and signed by the issuing judge.

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2. Be directed to a law enforcement officer.
3. Command that a particular specified place or person be searched.
4. Particularly describe the subject matter of the search.
5. Be dated.
6. Be based upon a sworn complaint or affidavit showing "probable cause."

A search warrant must meet all of the above requirements. The officer should pay special heed to the requirement of a particular specified place. A physical description of the building, or a description of the apartment as being on the second floor in the north east corner of the building, are good examples of how to ensure accuracy in the warrant. If you intend to search the home, the garage and the car in the garage, specify all of these areas. Any evidence seized under an invalid warrant will be inadmissible, just as if it had been seized without a warrant or without reasonable grounds.

B. *Secrecy of warrant*

The statutes direct that search warrants be issued with "all practicable secrecy." The record on which a search warrant is based is not to be filed or made public until the warrant is executed. Further, there is a criminal sanction of up to \$10,000 fine and/or imprisonment up to two years for anyone who makes any disclosure concerning a search warrant prior to its execution, unless the disclosure is necessary to its execution.

C. *Executing a search warrant*

A search warrant may be executed anywhere in the state by a police officer with police authority in the search location. The search warrant must be executed and served by midnight of the fifth day, counting holidays and weekends, following its issuance.

Although not expressly required by statute, some courts have held that the officer executing a search warrant must have it in their possession and display it if so requested. The statute expressly authorizes the use of "all necessary force" in executing a search warrant. After execution, it must be returned within 48 hours, **excluding** holidays and weekends, even if the five-day period would not yet have ended. The 48-hour rule, however, is ministerial and does not automatically affect the validity of the search.

The police may search any person found at the warrant site if the warrant so specifies or allows for the search of unnamed people. Otherwise, the police may frisk any people they might encounter at the warrant scene **if** they can articulate a reasonable safety concern.

The police may search any items found at the warrant scene, even if they do not belong to the residence's owner, so long as the item has the possibility of containing the evidence searched for and the item is not directly found on a person.

D. *Knocking requirement*

The Constitution requires that in most circumstances an officer knock and announce before seeking to execute a search warrant. However, there are a few exceptions to the "knock and announce" requirement. These exceptions are:

1. Warrants with expressed no-knock authorization.
2. When an officer upon arrival at the scene reasonably believes that knocking and announcing will create a strong likelihood of the destruction of evidence or danger to the officer or others.

E. *Things seized under a search warrant*

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Anything described in the search warrant may be seized. With respect to things seized, but not particularly described in the warrant, the Wisconsin Supreme Court has adopted four requirements:

1. The evidence must be discovered in the course of a lawful search.
2. The evidence, by itself or with facts known to the officer provides a connection between the evidence and criminal activity.
3. The evidence is discovered in the physical area searchable under the warrant.
4. The evidence is discovered while the officer is actually searching for objects listed within the warrant.

Whenever this standard is met, the seizure is valid. The search must terminate when all the items named in the warrant are found.

F. *Telephone search warrant*

Wisconsin §968.12 provides for the issuance of a search warrant based upon oral testimony.

The normal procedure would be for the officer requesting the warrant to call the judge, identify themselves as a police officer and indicate that they are requesting an oral or telephone search warrant. The officer must then supply the judge with sufficient information so the judge may determine that: (1) the procedure to obtain a written search warrant cannot be done promptly; and (2) prompt execution of the search warrant is necessary.

If the judge finds these two requirements have been met, the officer should then advise the judge of the information they would normally put in an affidavit; namely, the probable cause for the warrant. If the judge finds the probable cause to be adequate, the officer may then proceed to completing the actual warrant. The officer must complete a duplicate original of the warrant and must read that duplicate original verbatim to the judge. The judge may modify the warrant if they feel it appropriate or may indicate it is satisfactory in its original form. The judge would then direct the officer to sign the judge's name to the bottom of the warrant and also sign their own name. The officer may then execute the warrant by using that duplicate original for the purpose of execution. The judge, in the meantime, shall have completed the original warrant, signed it and filed it with the court file.

It is required that the telephone conversation, subsequent to the officer informing the judge that the purpose of the call is to request a warrant, be recorded by means of a voice recording device. This recording can be at either end of the conversation (at the judge's residence or telephone, or at the phone from which the officer is making the call). If no such voice recording device is available, this procedure may not be used.

This statute makes a warrantless search of someone's home or other property more difficult to justify. The necessary requirements for warrantless search are that there be probable cause and, in most situations, exigent circumstances. Showing exigent circumstances may be difficult, unless an attempt is made to obtain a telephonic warrant. If a warrantless search is made the officer must be prepared to answer questions as to why a telephonic warrant was not requested.

VIII. WITHOUT WARRANT

A search may validly be conducted without a warrant under the following situations:

A. *Incident to lawful arrest*

When a person is lawfully arrested and taken into custody, the officer may conduct a complete search of the person. This search incident to lawful arrest is not limited to a protective pat-down for weapons, nor is it limited to fruits, instrumentalities or evidence of the crime for which the arrest is made, but can be made for any evidence. The officer may also search the area readily accessible to the arrested persons, and any items the suspect has in their possession, including luggage, briefcase, etc.

A person stopped on a traffic charge where a citation is issued generally may not be searched. However, an individual arrested and taken into custody on valid probable cause of a violation of the criminal code may be thoroughly searched for weapons or evidence before being placed in a squad car.

The search incident to lawful arrest must be made contemporaneously with the arrest. The immediate area may be searched when the person is arrested. If a person is arrested at their home, the officer may **not** return after booking the suspect to continue a warrantless search.

Courts have declared that the area immediately accessible to an individual is that area within reach of their outspread arms ("wing-span"), or that area immediately surrounding them into which they can "lunge" to reach a weapon or to destroy evidence

Even with this expansion, however, an arrest may not be used as an obvious shortcut to a warrantless search.

B. *Protective sweep*

If making an arrest in a home, in addition to a search incident to the arrest, the police may conduct a protective sweep for those areas of the home for which an officer has a reasonable suspicion a confederate may be lurking. This sweep is limited in nature and must be specifically targeted to the finding of people. It is not to be used as a ruse for an investigatory search for evidence.

C. *Hot pursuit*

When in pursuit of a suspect wanted for a jailable offence, an officer may enter a home without a warrant if they have probable cause to believe the accused suspect is in the home. This hot pursuit exception is limited to a suspect wanted for a jailable offence (misdemeanor or felony, not ordinance violation) and to a direct pursuit scenario.

D. *In public place*

No search warrant will be required to search a place open to the public, except in certain situations where the person has a "reasonable expectation of privacy." This includes public lands, places of business (but not the private office of one conducting the business) and common areas of apartment buildings.

A closely related exception is the "open fields" concept. Open fields, although privately owned, fenced and even posted "No Trespassing," are not such as gives the person in possession a reasonable expectation of privacy. Only the home and "curtilage" are protected from warrantless search. The curtilage is the area of close proximity to the home. To determine whether an area is curtilage, and thus covered by the Fourth Amendment, or open fields, and thus not covered, the courts look at the following four factors:

1. The proximity of the area to the home.

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2. Whether or not the area is enclosed in some fashion.
3. The use of the area, if it used for personal family reasons, it is more likely to be seen as curtilage.
4. Steps taken by the owner to prevent the area from being observed by people walking by.

E. *In "plain view"*

The "plain view" exception is more properly an instance of valid warrantless seizure than warrantless search because no search occurs when an object is in the "plain view" of the officer.

One restriction on this exception is that the officer lawfully be in the place from which they see the object. A gun lying on the floor of an automobile would be in plain view of an officer making a traffic violation arrest. If, however, the car were in the owner's garage, which the officer entered without permission or warrant, the gun would still be in plain view, but viewed during an unlawful search.

A second restriction to this exception is the requirement that the items seized be obviously identifiable as contraband or evidence.

A third restriction is that the officer has constitutional access to the item to be seized. Contraband in a home can be observed in plain view by an officer on the street. However, the officer still cannot enter the home to seize the item unless they have a warrant to enter the home, an emergency exists, or exigent circumstance to justify the warrantless intrusion into the home. **NOTE:** The U.S. Supreme Court has abolished the inadvertency requirement for a plain view seizure.

The U.S. Supreme Court has allowed an "order out" of a motorist stopped for a traffic violation. As the motorist opens the door and steps out of the vehicle, the principles of plain view enable the officer to observe the suspect, the suspect's clothing and the inside of the vehicle for criminal evidence. The court viewed the safety factor as justification of the order. Also the U.S. Supreme Court has allowed an "order out" of passengers in a vehicle which has been lawfully stopped.

An officer may use a flashlight to see at night what would be in plain view in daylight, all else being legal.

IX. CUSTODIAL SEARCHES

Any person arrested and taken into custody may lawfully be thoroughly searched by the jailer, in addition to the search which may have been done incident to arrest by the officer in the field.

The justification for this is to discover any articles on the suspect's person which could constitute a danger to themselves, other inmates or jailers. Articles on their person or in their car may be inventoried as a routine procedure both to protect their ownership interest and to protect the police from claims of conversion or theft. The person arrested will always be subject to a custodial search. If they are arrested in their car, which cannot safely be left at the scene of the arrest, the car may be inventoried at the police station. This would never occur if the person were arrested at home with their car parked in the driveway.

There are times when an arrested person will demand that their car not be impounded. It is necessary that an officer have a reasonable police reason to impound, and may not impound a person's car just because they are arrested. You may not automatically impound a car just because you arrest the operator. You must consider whether the location and circumstances would reasonably allow the car to be left on the street or in a public parking area.

X. CONSENT SEARCHES

No search warrant is required if a person having control of the place or thing to be searched gives their consent to the search. This consent must, however, be voluntarily, freely and knowingly given. The consent must not be coerced by, for example, stating that the person is "making trouble for themselves" by not cooperating. If after indicating an intent to search with or without consent an officer is told, "O.K., go ahead," the consent is not voluntary.

If an officer requests consent of "X" to search their home by indicating that if consent is not given the officer will get a warrant and make the search anyway, the consent may not be voluntary. If the officer had probable cause sufficient to obtain a warrant at the time they asked for consent and the request is not made in a coercive manner, the consent would be valid. If, however, the officer did not have probable cause and was attempting to run a bluff even if they obtain consent, it would have been coerced and later the search could be determined to be invalid.

If the officer specifies the nature of the item to be searched for, the scope of the consent will be limited to any area where there is a chance to find the targeted object.

In consent search of vehicles, it is important that the officer end the original traffic stop before asking for consent. The officer should tell the subject that they are free to go and then ask for permission to search as part of a consensual encounter.

A. Who may give consent

The person who consents to a search must have the authority to grant consent. In the case of a juvenile or adult suspect who lives with their parents, the parents can always consent to a search of the grounds, garage and common areas of the home. If the suspect has their own bedroom which is kept private and the parents respect this privacy, their consent to search the bedroom might be ineffective against the suspect's reasonable expectation of privacy. If the suspect pays their parents room and board, this fact would buttress their claim to privacy. Depending on the circumstances a juvenile may have authority to consent to search their parent's home but only to areas of mutual use.

XI. ABANDONED OBJECTS

This is another exception which is not really a search. A scrap of paper which turns out to be a policy slip or a cigarette butt containing marijuana that was thrown on the ground is abandoned and may be seized. A person seen discarding such an object could then be arrested. Trash placed at the curb on trash pick-up day is generally considered abandoned.

Also, if a subject leaves their property behind because they are fleeing from the police, the property is deemed to be abandoned.

XII. INSPECTION PURSUANT TO LAW

Certain types of businesses, such as restaurants, taverns and hotels, are licensed and subject by statute to unannounced searches under penalty of loss of license. Proprietors of such establishments "consent" beforehand to searches, which extend to the entire area of the business premises. An upstairs apartment could not be searched, and the owner's attached office should not be searched under the provision. In some cases, refusal to consent may constitute a misdemeanor, which would justify an arrest which, in turn, justifies a full search of the person and of the area immediately accessible to them. Each profession or occupation may be subject to varying procedures for inspections, and the officer should consult with the appropriate regulatory agency prior to any warrantless search.

XIII. AUTOMOBILES

Perhaps the best-known exception to the warrant requirement is the "automobile exception." It applies not only to automobiles, but also boats, airplanes or any movable vehicle. The "mobility" of the automobile, the possibility of moving out of the jurisdiction, justifies a warrantless search. Probable cause is required but proof of exigent circumstance is not. Based on probable cause, an officer may search anyplace in an automobile that is reasonable to believe the object of the search might be located. This includes searching any container; closed, locked or open. The officer may search places a judge could give a warrant to search. An officer should say to themselves, "Based on the information I have, what areas would a judge let me search, and for what items?"

The U.S. Supreme Court has abolished any distinction between a probable cause search of an automobile and a search of a particular object known to be in the automobile. Therefore, whether the investigatory focus is on the automobile in general or on a particular object, with probable cause the officer may search within the automobile and seize evidence without a warrant.

A. Search Incident to Arrest

The search incident to arrest doctrine of automobiles is not an automatic police entitlement and may only be applied when:

1. The defendant is still in a position to lunge into the vehicle. It is a very rare circumstance, and an extremely dangerous one, when a police officer will be searching a vehicle while a defendant maintains freedom of movement. Officers will not permit a subject that has been arrested access to the vehicle being searched simply to circumvent restrictions on vehicle searches.
2. Officers may also search the "lunge area" of a vehicle if the officer reasonably believes that the vehicle has evidence supporting the arrest. This search is limited to evidence that supports the arrest only and is not available for evidence unrelated to the arrest.

If a person is arrested in an automobile or immediately after having exited an automobile, and the circumstances permit a search incident to that arrest, the search area includes the "lunge area" when the person was in the automobile

The U.S. Supreme Court has held that the interior of the automobile will be automatically considered to be the lunge area without the officer having to prove that the individual could reach or control any particular item within the interior of the automobile. Thus, incident to a legal custodial arrest, the officer may search the person and the interior of the automobile, including any closed containers and the locked glove compartment, if the officer has a reasonable suspicion that evidence specifically related to this arrest is located within the vehicle. The officer may *not* go into the trunk of the automobile.

B. Inventory

An inventory of an automobile may be done if the automobile is legally impounded. An inventory indicates that the items in the car are inventoried to protect the officer from claims of theft, to protect the automobile owner's property and to protect the integrity of the impound area. An inventory authorizes an officer to go into all parts of the car, including the glove compartment or trunk. Officers have authority to open closed containers found within the car in accord with Kenosha Police Department policy.

When a vehicle has been lawfully impounded and is to be inventoried according to policy, it should be inventoried as soon as practicable. A search conducted after the car has been in

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custody for weeks would appear to be a search for evidence and difficult to justify as an inventory to protect the owner's possessions. An inventory of an automobile is just that, and not an investigatory search for evidence. Evidence discovered while legally doing an inventory is admissible in court. The important thing is the court's decision as to what your intent was at the time of inventory. Having a checklist to show what is done each time helps prove it was an inventory and not an investigation.

The scope of an inventory search shall include the areas which can be readily entered. The glove compartment, console or trunk are within the scope of this search. Containers found in the vehicle shall be opened if the content cannot be determined without opening them. The inventory search shall be conducted in a manner to avoid any unnecessary damage to the vehicle or its contents.

IX. SEARCH OF A PERSON

When you have the statutory authority to search a person you must search thoroughly. All subjects in your custody must be carefully searched before transporting or turning them over to another officer or detention personnel. A thorough search must be conducted anytime that you accept custody of a subject from another officer or agency.

IMPORTANT: Use appropriate personal protective equipment, such as fluid-resistant gloves whenever possible.

Proper searching requires that you search all areas of the body, including parts such as the groin that are ordinarily private. While this is likely to be somewhat uncomfortable for both the officer and subject, it is necessary because of the potential safety risk if an area is left unsearched. A systematic and professional procedure can minimize the discomfort associated with searching. While a same-sex search is ideal, that is not always possible or feasible. Because ensuring the safety of both officers and the public outweighs gender concerns in an arrest, an officer of either sex may search a subject of either sex.

If a Strip Search must be conducted it will be performed in accordance with Policy [1.6 Strip Search](#), and Wisconsin Stat. §968.255.

Certain basic principles apply to all searches:

- Stabilize and handcuff the subject before searching.
- Search systematically and thoroughly.
- Search from behind the subject, not in front.
- Search as many times as necessary.
- If you find a weapon, assume there is another.

*Officers should refer to guideline and training as set forth by the Wisconsin Department of Justice, Law Enforcement Standards, Defensive and Arrest Tactics.

V. OWI Search Warrants

Due to the US Supreme Court decision in *Missouri v. McNeely*, compelled blood draws for criminal OWI cases must now be obtained with the use of a search warrant. If an officer makes an arrest for a criminal OWI and the violator refuses to submit to a blood test, the officer must obtain a search warrant before taking the blood without the violator's consent.

This procedure is only for criminal OWI offenses, not municipal OWI violations. Blood draws will not be compelled for municipal OWI violations.

A. The following procedure will be followed for obtaining an OWI Search Warrant.

- Ask for consent to draw the blood.

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- If a defendant grants consent, you can take the blood in accordance with our normal policy. Please document the fact that the defendant consents in your report.
- If the defendant refuses to submit to a chemical test of his/her blood please fill out the OWI Warrant Application. Please have the application filled out **PRIOR** to contacting a court official. Best practice is to have the application **notarized** prior to sending it to the appropriate court official. If for some reason you are unable to have it notarized please make the Circuit Court Judge/Court Commissioner aware of that fact when you have phone contact with him / her. The preference of the Judges and the District Attorney's Office is that you have the document notarized before contacting the court official. The reason for this is that the communication with the appropriate official will be by phone and e-mail only.

B. Procedure once the application is filled out:

- Please e-mail the application to **(See Current Procedure)** .
- b. Once you have sent the e-mail please call **(See Current Procedure)**. Calling this number will connect you to the on call court official. If for some reason the on call court official does not answer, please call this number two more times. If you still receive no answer follow the normal procedure for obtaining a warrant (contact another court official).
- c. At that time, the on call court official will review the application request. If the application is sufficiently and properly filled out the court official will fill out the actual pocket size search warrant. The court official will then take a picture of the signed pocket sized warrant and will e-mail back to the address the application was originally sent from. Please print off a copy of that warrant and the application for the defendant. The court official will file the original warrant with the clerk of courts.
- d. Provide the court official with a return phone number in case any questions arise. This may be provided this in your original e-mail.
- e. Once the search warrant is signed, draw the defendant's blood pursuant to the DA's Office normal procedure (two blood draws approximately 1 hour apart).
- f. Fill out the search warrant return. The return, along with the original affidavit and a copy of the search warrant you served on the defendant must be filed with the court within 48 hours. The statutes do not count the time between Friday at 4:30 p.m. and Monday at 8 a.m. Thus, if a search happens on a weekend, please file these documents on Monday morning at the earliest possible opportunity.
- ****Please remember that if the investigating officer transports a defendant to the hospital, or is otherwise detained, another officer can get the warrant and call when the warrant has been signed by a Judge or Court Commissioner. At no time should a defendant be taken to a Judges/Court Commissioners house when attempting to obtain a search warrant**