

# CWI - Carrying While Intoxicated

Sean P. Healy, TSRA General Counsel

A TSRA member read my last column, and asked me a question about concealed handgun licenses. It was a great question, so we decided to share the information with everyone else. The member, a CHL holder, asked a DPS trooper whether he could have one beer with dinner while carrying his handgun. The trooper told him that if he had anything to drink, and had a handgun inside the vehicle or on his person, he would be arrested.

Penal Code § 46.035(d) states that it is illegal for a CHL holder to carry a handgun under the authority of the CHL law, while he is "intoxicated." To violate this law you must be carrying a handgun, be intoxicated, have a valid CHL, and not have any other legal authority other than the CHL to carry the gun.

The officer seemed to be advising the member to store his gun away from his person, so he is no longer "carrying" it under authority of his CHL. Instead, he would be keeping it in his car, under the authority of the Motorist Protection Act. I am not sure this is sound legal advice, for several reasons. First, if someone is truly intoxicated, he has no business driving. Second, one of the requirements of the MPA is not to be committing any crime above a Class C Misdemeanor traffic offense. If someone is driving while intoxicated, he is committing a Class B Misdemeanor or a more serious crime, so the MPA does not apply. Finally, assuming the person has a CHL and meets the requirements of the MPA, he can rely on the MPA and not the CHL for a authority to have the gun in his car. The MPA does not require the gun to be unloaded or inaccessible. But even if storing the gun unloaded in the trunk might not give you any additional protection under the law, it might be enough to persuade an officer not to arrest you.

The term "intoxicated" has different definitions in different parts of the Penal Code:

- Driving While Intoxicated: Penal Code § 49.01 defines "intoxicated" for purposes of offenses such as driving while intoxicated, public intoxication, and similar offenses. It defines the term as 1) not having the normal use of mental or physical faculties because of introduction of alcohol, drugs, or any other substances into the body; or 2) having an alcohol concentration of .08 or more. But this definition applies only to the offenses defined in Chapter 49, not to the rest of the Penal Code.
- Selling a gun or ammo to an intoxicated person: Penal Code § 46.06(a)(3) makes it illegal to intentionally, knowingly, or recklessly sell a gun or ammo to an intoxicated person. Section 46.06(b)(1) defines "intoxicated" as a substantial impairment of mental or physical capacity resulting from introduction of any substance into the body. But this definition only applies to this one section of the Penal Code.
- Carrying While Intoxicated: Penal Code § 46.035(d) is the section making it illegal to carry a handgun while intoxicated, under the authority of a CHL. It does not define "intoxicated." I could not find any reported cases defining the term for purposes of this section. I would expect this to change, as people are convicted of this offense and challenge the definition of "intoxicated" in the courts of appeal, but for now I cannot give you a specific definition of the term.

If the statutes and case law do not specifically define a term, then the ordinary meaning normally applies. If you ask a layperson what "intoxicated" means, he would probably say something similar to the second definition quoted above - *substantial* impairment because of alcohol or some other substance. But the first definition could also apply, and it requires only a showing that you did not have the *normal use* of your faculties. This seems like a much lower standard than substantial impairment.

The definition of "intoxicated" under § 46.035 does not depend on the blood alcohol content. This means you cannot prove you are *not* intoxicated simply by proving your BAC was lower than .08. But conversely, the prosecutor can't prove you *were* intoxicated simply by establishing a higher BAC. I believe either side could probably submit evidence of your BAC, to be considered along with the other factors.

Due to the difference in the definitions, it is possible for someone to be intoxicated [for purposes of § 45.035(d)] and not intoxicated [for purposes of Chapter 49] at the same time. That means you could be found guilty of carrying while intoxicated, and not guilty of driving while intoxicated.

For most people, one beer probably does not cause substantial impairment. Under any reasonable definition, most people would agree that an ordinary person who has had one beer is not intoxicated. Most people who end up on a jury would probably agree, but there are some people who would consider it to be unreasonable to have *anything* to drink while carrying a loaded gun.

If you choose to consume any alcohol while carrying a gun, you are taking a legal risk. Law enforcement agencies may have an "arrest first, ask questions later" policy when it comes to alcohol and guns. Some officers may make a personal decision to arrest everyone under these circumstances. Some law enforcement agencies and prosecutors have taken this position on other firearm-related issues over the past few decades. Most or all of the CHL instructors advise their students not to drink any alcohol at all while carrying a handgun.

Carrying a gun is a huge responsibility. You have a moral duty to make sure your decisions do not put people around you at risk. You must comply with all the laws specifying where and how you can carry. You also expose yourself to civil liability for your actions. Any impairment to your thinking or reflexes will make it harder for you to make the right decisions. Remember from your CHL course all the factors that determine whether you acted reasonably in drawing your gun and using it for self-defense? It is hard to imagine having to make a split-second life and death decision after having a couple of drinks. Finally, even if you are later acquitted, it is expensive and unpleasant to be arrested and charged with a crime.

You should think long and hard before deciding to have a drink while carrying your gun.