THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED AFTER JANUARY 1, 2010 AND BEFORE DECEMBER 10, 2017.

2621 OPERATING WHILE REVOKED: CRIMINAL OFFENSE[1]: REVOCATION RESULTED FROM AN OWI-RELATED OFFENSE — § 343.44(1)(b)

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (three) (four)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

3. The defendant knew (his) (her) operating privilege had been revoked.[8]

NOTE: THE DEFENDANT'S ADMISSION THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THE FOURTH ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "DECIDING ABOUT KNOWLEDGE."[9]

[4. The revocation resulted from an offense that may be counted under section 343.307(2).][10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[11]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (three) (four) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2621 was originally published in 2001 and revised in 2006, 2010, and 2013. This revision was approved by the Committee in April 2018.

The 2018 revision added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2620A.

This instruction is drafted for a criminal violation of § 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005]. Under Act 25, operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI-Criminal 2620]; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," the offense addressed by this instruction. [The captions in the instruction and the Comment refer to this as revocation "for an OWI-related offense."] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This requirement is reflected in the fourth element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C and Wis JI-Criminal 2600, Sec. IX.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 9, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI-related offense, addressed by this instruction, or if they were second offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the cause of the revocation, is submitted to the jury. See note 9, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license

issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

8. The requirement that the person "knowingly operate" while revoked was added to § 343.44 by 1997 Wisconsin Act 84. This appears to codify the more demanding of two alternative mental elements established for operating while revoked offenses by the Wisconsin Supreme Court in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). Collova held that the offense required either that the person "knew" or "had cause to believe" that operating privileges had been revoked. The statute, as amended, codifies the more demanding requirement of actual knowledge of revocation, apparently eliminating "had cause to believe" as an alternative.

9. The fourth element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

10. This element is not to be included if the defendant admits that the revocation was OWI-related. See note 9, supra.

The text of the fourth element is based on the text of s. 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under s. 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language "may be counted under s. 343.307(2)" because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

11. While the amendment of § 343.44 by 1997 Wisconsin Act 84 added "knowingly" to the definition of the offense, see note 8, supra, the act did not affect the provision regarding failure to receive mailed notice of revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation . . . mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation. . . ." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the

issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.