

**2626 OPERATING WHILE REVOKED: CRIMINAL OFFENSE:
PERMANENT REVOCATION — § 343.44(1)(b) and (2)(ar)2m.**

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is permanently 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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle¹ on a highway.²

A motor vehicle is operated when it is set in motion.³

2. The defendant's operating privilege⁴ was permanently revoked⁵ at the time the defendant operated a motor vehicle.

[A person's operating privilege remains revoked until it is reinstated.]⁶

Jury's Decision

If you are satisfied beyond a reasonable doubt that both 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 2626 was approved by the Committee in July 2018.

This instruction is to be used for offenses committed on or after December 1, 2018. That date is the effective date for 2017 Wisconsin Act 172, which created the crime of operating after permanent revocation. It applies only where the person has a previous conviction for this offense. The penalty is a fine of not more than \$10,000 or imprisonment for not more than one year or both. § 343.44(2)(ar)2m.

The instruction refers to “permanent revocation” in place of the statutory reference to a revocation “under s. 343.31(1m).” That statute identifies “qualifying convictions” and other facts that provide the basis for the department of transportation to revoke the person’s operating privilege permanently.

The Committee concluded that the fact that the revocation was permanent 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 fact that the defendant has a prior conviction for the offense need not be submitted to the jury. See Apprendi.

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

2. “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).

3. Instructions for operating after revocation have 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.

4. 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.

5. The instruction refers to “permanent revocation” in place of the statutory reference to a revocation “under s. 343.31(1m).” That statute identifies bases for the department of transportation to revoke the person’s operating privilege permanently. The Committee concluded that the jury must find that the privilege was permanently revoked but that it need not make a finding of the basis for that permanent revocation.

6. 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.

Despite the revocation being “permanent,” a person is eligible to apply for reinstatement after 10 years have elapsed.” § 343.31(1m)(b) and (c).