

2660A OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — CIVIL FORFEITURE — 0.08 GRAMS OR MORE — § 346.63(1)(b)

Statutory Definition of the Crime

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway¹ while that person has a prohibited alcohol concentration.²

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)³ must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle⁴ on a highway.⁵

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]⁶

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]⁷

2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means⁸

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED⁹ AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"¹⁰ THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:¹¹

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify

prosecuting agency is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing 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 2660A was originally published in 1982 and revised in 1985, 1993, 2004, 2006, and 2014. The 2014 revision added to the Comment to refer to the finding required for installation of an ignition interlock device. The 2015 revision made a nonsubstantive correction in the Comment.

The 2004 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

The 2006 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

This instruction is for a first offense under § 346.63(1)(b), which is punished as a forfeiture. For criminal violations, see Wis JI-Criminal 2660. For instructions for cases where both "under the influence" and "prohibited alcohol concentration" charges are submitted based on a single act of driving, see Wis JI-Criminal 2668 [forfeitures] and Wis JI-Criminal 2669 [criminal charges].

For first offenses under § 346.63(1) where the defendant has a prohibited alcohol concentration of 0.15 or more, "[a] court shall order a person's operating privilege . . . be restricted to operating vehicles that are equipped with an ignition interlock device and . . . shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device . . ." See § 343.301(1g) intro. and (b)1. The Committee concluded that whether the

alcohol concentration was 0.15 or more is not an issue that must be submitted to the jury. Installation of the device is not a penalty and thus is not subject to the rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which requires that all facts that increase the penalty for a crime be submitted to the jury. Thus, the judge makes the necessary finding when it is alleged that the 0.15 level is an issue.

The constitutionality of penalizing the "status" of having a prohibited level of alcohol concentration has been upheld. State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984); State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989). Defendants may not litigate the validity of the "partition ratio" that is used to calculate the prohibited breath alcohol level. McManus, 152 Wis.2d 113, 123.

In City of Omro v. Brooks, 104 Wis.2d 352, 311 N.W.2d 620 (1981), the Wisconsin Supreme Court discussed the propriety of directing a verdict against the defendant in a forfeiture action for operating under the influence. The court held that the trial court erred not directing a verdict of guilty on the facts of that case. Brooks dealt with a charge of operating under the influence under a municipal ordinance in conformity with the state statutes, which at that time did not include a prohibited alcohol concentration offense. And, the evidence showing that the defendant in Brooks was under the influence was completely uncontradicted – the defendant testified and admitted the fact.

1. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

2. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol concentration – blood alcohol or alcohol in the breath – in the definition of the second element.

3. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

4. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

6. This is the definition of "drive" provided in § 346.63(3)(a).

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The definitions are provided in § 340.01(46m) and (1v). See note 2, supra.

9. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment,

Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.