

DRIVING WHILE INTOXICATED
(Unclassified Misdemeanor¹)
VEHICLE & TRAFFIC LAW 1192(3)
(Committed on or after Nov. 1, 1988)

The _____ count is Driving While Intoxicated.

Under our law, no person shall operate a motor vehicle while in an intoxicated condition.

Some of the terms used in this law have their own special meaning. I will now give you the meaning of the following terms: “motor vehicle,” “operate,” and “intoxicated.”

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular power.²

To OPERATE a motor vehicle means to drive it.

[NOTE: Add the following if there is an issue as to operation:

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing it in operation, and when the motor vehicle is moving, or even if it is not moving, the engine is

¹If the defendant has within the previous ten years been convicted of a violation of Vehicle and Traffic Law § 1192(2), (3), or (4), or of Penal Law §§ 120.03, 120.04, 125.12, 125.13, a conviction of driving while intoxicated is a felony. Vehicle and Traffic Law § 1193(1)(c). For the gradation of the offense for “special vehicles” see Vehicle and Traffic Law § 1193(1)(d).

²The term “motor vehicle” is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge, but appear in the Appendix to this charge and should be charged if in issue. The term “public highway” appearing in the definition of “motor vehicle” is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of “motor vehicle” is restricted to a vehicle operated or driven on a “public highway,” the provisions of Vehicle and Traffic Law § 1192 expressly apply to “public highways, private roads open to motor vehicle traffic and any other parking lot.” Vehicle and Traffic Law § 1192(7). (The term “parking lot” is also specially defined by Vehicle and Traffic Law § 1192[7]. See also *People v Williams*, 66 NY2d 659 [1985].) The definition of “motor vehicle” has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

running.^{3]}

A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is incapable, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver.⁴

The law does not require any particular chemical or physical test to prove that a person was in an intoxicated condition. To determine whether the defendant was intoxicated you may consider all the surrounding facts and circumstances, including, for example:

defendant's physical condition and appearance, balance and coordination, and manner of speech;

the presence or absence of an odor of alcohol;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety];

[the circumstances of any accident].

[NOTE: If there is evidence of blood-alcohol content, add the following applicable paragraphs:

You may also consider the results of any test of the content of alcohol in defendant's blood.]

[In this case, the device used to measure blood alcohol content was (specify). That device is a generally accepted

³See *People v Alamo*, 34 NY2d 453, 458 (1974); *People v Marriott*, 37 AD2d 868 (3d Dept 1971).

⁴See *People v Cruz*, 48 NY2d 419, 428 (1979); *People v Ardila*, __ NY2d __ (decided 2/16/95).

instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.^{5]}

[Under our law, evidence that there was less than .10 of one per centum by weight of alcohol in defendant's blood is prima facie evidence that the defendant was not in an intoxicated condition.^{6]}

In considering the results of any test given to determine the alcohol content of defendant's blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.⁷

[Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly

⁵This paragraph may only be used when the device employed is included on the Department of Health schedule (10 NYCRR § 59.4[b]) of those devices satisfying its criteria for reliability (10 NYCRR § 59.4[a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (*People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

⁶Vehicle and Traffic Law § 1195(2)(c).

⁷*People v Freeland*, 68 NY2d 699 (1986).

given.^{8]}

[NOTE: Add where applicable:

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.^{9]}

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), operated a motor vehicle; and
2. That the defendant did so while in an intoxicated condition.

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Driving While Intoxicated as charged in the ___ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Driving While Intoxicated as charged in the ___ count.

⁸See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

⁹See *People v Thomas*, 46 NY2d 100 (1978) appeal dismissed for want of a substantial federal question 444 US 891 (1979).