DRIVING WHILE INTOXICATED[1]
(Common Law)
Vehicle & Traffic Law 1192 (3)
(Committed on or after July 1, 2003)
(Revised Jan. 2008 and Dec. 2014)[2]

The (*specify*) count is Driving While Intoxicated.

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[1] This crime is classified a misdemeanor unless:

[1] If the defendant has within the previous ten years been convicted of a violation of Vehicle and Traffic Law §§ 1192 (2), (2) (a), (3), (4), or (4-a) of Penal Law §§ 120.03, 120.04, 125.12, 125.13, or 125.14, a conviction of driving while intoxicated is a class E felony. Vehicle and Traffic Law § 1193 (1) (c) (i).

[2] If the defendant has within the previous ten years twice been convicted of any of those crimes, a conviction of driving while intoxicated is a class D felony (*see* Vehicle and Traffic Law § 1193 [1] [c] [ii]). For the gradation of the offense for "special vehicles," see Vehicle and Traffic Law § 1193 (1) (d).

Thus, an additional element of this crime when charged as a Class D or E felony is that the defendant has previously been convicted of one or more particular crimes. That element must be charged in a special information and, after commencement of trial, the defendant must be arraigned on that special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. However, if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements (*see* CPL 200.60; *People v Cooper*, 78 NY2d 476 [1991]).

[2] The purpose of the revision was to provide a clearer definition of "operates" by removing the language "for the purpose of placing it in operation" and replacing such language with "for the purpose of placing the vehicle in motion" (*see People v Alamo*, 34 NY2d 453, 458 [1974]; *People v Marriott*, 37 AD2d 868 [3d Dept 1971]; *People v O'Connor,* 159 Misc 2d 1072, 1074-1075 [Suffolk Dist Ct 1994]; s*ee also People v Prescott*, 95 NY2d 655, 662 [2001]).

The 2014 revision was for the purpose of incorporating an instruction to accord with *People v Fratangelo*, 23 NY3d 506 (2014). *See* footnote 7.

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

The following terms used in that definition have a special meaning:

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.[3]

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 the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.[4]]

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.[5]

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[3] The 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. 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.

[4] *See* cases cited in footnote 2.

[5] *See People v Ardila*, 85 NY2d 846 (1995); *People v Cruz*, 48 NY2d

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:

* the 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];

* [the results of any test of the content of alcohol in the defendant's blood].

[*NOTE: If there is evidence of blood-alcohol content, add as applicable* [6] *:*

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

419, 428 (1979).

[6] This paragraph may be used only when the device employed is included on the Department of Health schedule (*see* 10 NYCRR § 59.4 [b]) of those devices satisfying its criteria for reliability (*see* 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 (*see People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

[*Note: If alcohol content is claimed to be less than .08, select appropriate paragraph. The first paragraph applies if such evidence is not by a chemical test, e.g. evidence is given by an expert; the second paragraph applies if such evidence is by a chemical test:*[7]

If you find from the evidence that there was less than .08 of one per centum by weight of alcohol in defendant's blood while [he/she] was operating the motor vehicle, you may, but are not required to, find that [he/she] was not in an intoxicated condition.

Or,

Evidence by a chemical test of breath, blood, urine, or saliva that there was less than .08 of one per centum by weight of alcohol in the defendant's blood is *prima facie* evidence that the defendant was not in an intoxicated condition.][8]

In considering the accuracy of 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

[7] *People v Fratangelo*, 23 NY3d 506 (2014).

[8] Vehicle and Traffic Law § 1195 (2) (c).

* whether the test was properly given.[9]
[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 given.][10]

[NOTE: If there was an improper refusal to submit to a test, add:

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.[11]]

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.

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[9] *People v Freeland*, 68 NY2d 699 (1986).

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

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

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.