

AGGRAVATED DRIVING WHILE INTOXICATED
(Drugs, With a Child)
Vehicle & Traffic Law 1192(2-a)(b)
(Committed on or after December 18, 2009)
(Revised Dec. 2021)¹

The (specify) count is Aggravated Driving While Intoxicated.

Under our law, no person shall operate a motor vehicle² while the person's ability to operate such a motor vehicle is impaired by the use of a drug³ while a child who is fifteen years of age or less is a passenger in such motor vehicle.

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.⁴

¹ The December 2021 revision was for the purpose of revising the definition of when a person's ability to operate a motor vehicle is impaired by the use of a drug to accord with the holding of *People v. Cadan*, 189 A.D.3d 84 (3d Dept 2020). Cf. *People v Cruz*, 48 NY2d 419, 428 (1979).

² At this point, the statute continues "in violation of subdivision two, three, four or four-a of this section while a child who is fifteen years of age or less is a passenger in such motor vehicle." This charge addresses a violation of subdivision four.

³ In Vehicle and Traffic law § 1192(4), the word "drug" is followed by the words "as defined in this chapter." Since the charge later sets forth the definition of "drug," the words "as defined in this chapter" have been omitted.

⁴ 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 N.Y.2d 659 [1985].) The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

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.^{5]}

The word DRUG includes (*specify*).⁶

A person's ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug has rendered that person incapable of employing the physical and mental abilities which that person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.⁷

The law does not require any particular chemical or physical test to prove that a person's ability to operate a motor vehicle was impaired by the use of a drug. To determine whether the defendant's ability to operate a motor vehicle was impaired, 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;

⁵ See *People v. Alamo*, 34 N.Y.2d 453, 458 (1974); *People v. Marriott*, 37 A.D.2d 868 (3rd Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist. Ct., Suffolk, 1994); See also *People v. Prescott*, 95 N.Y.2d 655, 662 (2001).

⁶ See Vehicle and Traffic Law §114-a and Public Health Law § 3306(1).

⁷ As indicated in footnote (1), this definition was revised in December 2021 to accord with the holding of *People v. Cadan*, 189 A.D.3d 84 (3d Dept 2020). The former definition read: "A person's ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver."

the presence or absence of an odor of a drug

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's being under the influence of a drug];

[the circumstances of any accident];

[the results of any test for the presence of drugs in the defendant's blood].

[NOTE: If there is evidence of drugs in the defendant's blood, add the following applicable paragraphs:]

In considering the results of any test given to determine the 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.^{8]}

[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.^{9]}

⁸ See *People v. Freeland*, 68 N.Y.2d 699, 701 (1986).

⁹ See *People v. Mertz*, 68 N.Y.2d 136, 148 (1986); *People v.*

[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 a drug in violation of law.^{10]}

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, each of the following three elements:

1. That on or about (date), in the County of (county), the defendant, (defendant's name), operated a motor vehicle;
2. That the defendant did so while his/her ability to operate a motor vehicle was impaired by the use of a drug; and
3. That the defendant did so while a child who was fifteen years of age or less was a passenger in that motor vehicle.

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

Freeland, 68 N.Y.2d 699, 701 (1986).

¹⁰ See *People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dismissed. for want of a substantial federal question, 444 U.S. 891 (1979).

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