2664B OPERATING A MOTOR VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 346.63(1)(am)

Statutory Definition of the Crime

Section 346.63(1)(am) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway[1] while the person has a detectable amount of a restricted controlled substance in his or her blood.

Burden of Proof

Before you may find the defendant guilty of this offense, the [(identify prosecuting agency) [2]] [State] must prove by evidence which satisfies you [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [beyond a reasonable doubt][3] that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant (drove) (operated) a motor vehicle[4] 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 detectable amount of a restricted controlled substance in his or her blood at the time the defendant (drove) (operated) a motor vehicle.

   [(Name restricted controlled substance) is a restricted controlled substance.][8]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (driving) (operating).[9]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt) that there was a detectable amount of a restricted controlled substance in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the (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 detectable amount of a restricted controlled substance in (his) (her) blood 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) (beyond a reasonable doubt).]

Jury's Decision

If you are satisfied [to a reasonable certainty by evidence which is clear, satisfactory, and convincing] [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 2664B was originally published in 2004 and revised in 2005, 2006, 2007 and 2010. This revision was approve by the Committee in August 2020; it added an alternative element to the instruction and to footnotes 8 and 9 based on 2019 Wisconsin Act 68.

This instruction is for a violation of § 346.63(1)(am), which was created by 2003 Wisconsin Act 97. Subsection (1)(am) provides that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The penalties for this offense are the same as those for operating under the influence offenses: a first offense is a civil forfeiture; second and subsequent violations are criminal. The instruction is drafted for both types of cases with the different burdens of proof in brackets; the applicable alternative should be selected.

Section 346.63(1)(d) recognizes a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta 9 tetrahydrocannabinol" that applies if the person proves that he or she had a valid prescription for the substance.

This instruction can also be used as a model for violations of other statutes that have been amended to prohibit operating with a "detectable amount . . ." See Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

The Wisconsin Court of Appeals has found the "detectable amount" provision to be constitutional. See State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474; and, State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

See Wis JI-Criminal 2664 and 2664A for instructions involving operating while under the influence of a controlled substance and a combination of an intoxicant and a controlled substance. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. They are cross-referenced by section number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

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

2. 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.

3. This instruction is drafted to be used for both civil forfeiture and criminal offenses. Use the first bracketed phrase for civil forfeitures and the second for crimes.

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

5. Regarding the definition of "highway," see Wis JI-Criminal 2600 Introductory Comment, Sec. I.

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 Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a restricted controlled substance in his or her blood remains a jury question. Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

9. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is

not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.