

DEFENDING OWI CASES AN OVERVIEW

ELEMENTS OF THE VIOLATIONS OWI/PAC

I. HIGHWAYS/PREMISES 346.61

346.61 Applicability of OWI and Reckless Driving Law

In addition to being applicable upon **highways**, ss. 346.62 to 346.64 are applicable **upon all premises** held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

A. Highways:

340.01(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools... and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

340.01(46) "Private road or driveway" is every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner and every road or driveway upon the grounds of public institutions other than public schools and institutions under the jurisdiction of the county board of supervisors.

B. Premises:

TEST: "whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." *City of LaCrosse v. Richling*, 178 Wis.2d at 860, 505 N.W.2d 448 (Ct. App. 1993).

1. A privately owned parking lot was not included under this section. City of Kenosha v. Phillips, 142 Wis. 2d 549, 419 N.W.2d 236 (1988).
2. A parking lot for patrons of a business is held out for the use of the public under this section. City of LaCrosse v. Richling, 178 Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993).
3. A gated community with secured entrance was held out for the use of the public under this section. State v. Tezca, 312 Wis.2d 395, 751 N.W.2d 896 (Ct. App.).
4. A frozen lake constitutes a “premis held out to the public”. State v. Minning, 688 N.W.2d 784 (Ct. App.) (unpublished)

II. OPERATION

- A. 346.63 (3) In this section:
 - (a) "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.
 - (b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.
- B. Test: “As long as one were physically or bodily able to assert dominion, *in the sense of movement*, then he has as much control over an object as he would if he were actually driving the vehicle.” Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct.App.1980),
- C. Circumstantial evidence may be used to prove operation of a motor vehicle. While the motor in a particular case may not be running, the jury is entitled to consider the circumstantial evidence to determine how and when the car arrived where it did and whether it was the defendant who operated it. State v. Mertes, 2008 WI App 179, 315 Wis. 2d 756, 762 N.W.2d 813, 07-2757.
 1. Defendant found sleeping behind wheel with engine running. Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct.App.1980).
 2. A defendant was not operating a vehicle under this section by merely sitting in the driver's seat of a parked vehicle, although the engine was running, when the uncontested evidence showed that the defendant was not the person who left the engine running, had never physically manipulated or activated the controls necessary to put the vehicle in motion, and there was no circumstantial evidence that the defendant recently operated the vehicle, while another person had operated the

vehicle. Village of Cross Plains v. Haanstad, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, 04-2232

III. TYPE OF VEHICLE

- A. “Motor Vehicle” applies to violations of 346.63(1) and 346.63(2m).
343.01(35) "Motor vehicle" means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.
1. John Deere tractor with back hoe constitutes a motor vehicle. Lemon v. federal Insurance Co., 111 Wis.2d at 567, 331 N.W.2d at 381.
 2. Road machinery, i.e. M-104 wheel roller (operates at about five to eight miles per hour and is only driven between construction sites where the distance is very short and it is not necessary to have an operator's license to operate the roller and it is not normally used for the transport of property or persons) constitutes a motor vehicle. State v. Anderson, 407 N.W.2d 568 (CT. APP. 1987)(unpublished).
 3. Off road dirt bike constitutes a motor vehicle. Washington County v. Kieper, 438 N.W.2d 597(CT. APP. 1989)(unpublished)
 4. 343.301(30) "Motor bicycle" means any of the following:
 - (a) A bicycle to which a power unit not an integral part of the vehicle has been added to permit the vehicle to travel at a speed of not more than 30 miles per hour with a 150-pound rider on a dry, level, hard surface with no wind and having a seat for the operator.
 5. 346.02(4) APPLICABILITY TO PERSONS RIDING BICYCLES AND MOTOR BICYCLES. (a) Subject to the special provisions applicable to bicycles, every person riding a bicycle upon a roadway or shoulder of a highway is granted all the rights and is subject to all the duties which this chapter grants or applies to the operator of a vehicle, except those provisions which by

their express terms apply only to motor vehicles or which by their very nature would have no application to bicycles. For purposes of this chapter, provisions which apply to bicycles also apply to motor bicycles, except as otherwise expressly provided.

- B. "Vehicle" applies to 346.63(2) (Causing Injury), 940.09 (Homicide) or 940.26 (Causing Injury GBH)

939.22(44) "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

- C. Wisconsin has consistently refused to include drunken snowmobiling (346.02 (10) 350.101), ATV'ing (346.02(11)) or boating (30.601) as an offense under its drunken driving statutes 346.63(1) and 346.63(2m) .

IV. UNDER THE INFLUENCE 346.63(1)(a) (1) No person may drive or operate a motor vehicle while:

- A. **under the influence** of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog:

1. Wisconsin Pattern Jury Instruction JI 2663 states :

“Under the influence of an intoxicant “means that the defendant’s ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.

Not every person who has consumed alcoholic beverages is “under the influence” as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.

- B. under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug **to a degree which renders him or her incapable of safely driving;**

V. UNDER THE INFLUENCE HOMICIDE/INJURY: 940.09: “Causes the death of another by operation of a vehicle while under the influence “ or 940.25 “Causes great bodily harm to another by operation of a vehicle while under the influence”.

A. 939.22(42) "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is **materially** impaired because of his or her consumption of an alcohol beverage, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

1. Wisconsin Pattern Jury Instruction JI 1185 states :
“Under the influence of an intoxicant “ means that the defendant’s ability to operate a vehicle was **materially impaired** because of consumption of an alcoholic beverage.

Not every person who has consumed alcoholic beverages is “under the influence” as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.

VI. DETECTABLE AMOUNT OF A CONTROLLED SUBSTANCE 346.63 (1)(am) and 940.09(am)

A. 301(50m) and 939.22(33) "Restricted controlled substance" means any of the following:

1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
 - a. OPIATES including morphine, heroin, are rapidly absorbed after oral ingestion, with peak plasma levels occurring about 15 to 60 minutes after the drug has been taken. After injection it peaks in 15 minutes. The principal metabolite for detection

is morphine-3, glucuronide, which can be detected in the urine for around 2 days.

- b. HEROIN has a similar pattern of metabolization and excretion to morphine, and a typical test will show a positive result between two and four days after use.
- c. LYSERGIC ACID DIETHYLAMIDE (LSD) has its effect within minutes after use but can last for 12 hours. LSD is rapidly metabolized and only a very small portion of the dose is excreted unchanged in the urine. LSD itself, however, can be detected up to 30 hours after use and the metabolites can be detected for periods of up to 72 hours.

- 2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in par. (a).

961.01(4m) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance included in schedule I or II and:

- 1. Which has a stimulant, depressant, narcotic or effect on the central nervous system substantially similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II; or

- 2. With respect to a particular individual, which the individual represents or intends to have a stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, narcotic or hallucinogenic effect on the central nervous system of a controlled substance included in schedule I or II.

- 3. Cocaine or any of its metabolites.

COCAINE is rapidly absorbed after smoking with the maximum plasma concentration occurring in 5 minutes. After snorting or sniffing maximum concentrations are reached in 30 to 40 minutes. Cocaine is metabolized extensively with only 1% being excreted unchanged in the urine. The major metabolite -Benzoylcegonine - can be

detected by an immunoassay test for approximately 48 hours.

4. Amphetamine.

AMPHETAMINES are metabolized and the drug will appear in the urine. Unchanged amphetamines have been detected in the urine up to 29 hours after a single dose of 5 mg. A positive amphetamine analysis indicates the use of amphetamine 24 to 48 hours previously.

5. Delta-9-tetrahydrocannabinol.

Delta-9-THC enters the bloodstream rapidly after smoking (in minutes) or more slowly when ingested orally (20 minutes to 1.5 hours). It is rapidly metabolized into inert molecules known as metabolites. These chemicals also have the word Tetrahydrocannabinol in them and are called THC, which can be quite confusing. Delta-9-THC is detectable in the blood for a few hours, but none of this active chemical is found in the urine or stored in the fatty tissues such as the liver and brain.

What is frequently described as THC's lingering in the body fluids and organs are metabolites of Delta-9-THC, the inert substances that the body disposes of in the urine and excrement, in much the same way as it disposes with Vitamin A. It is these that are detected in the body organs and urine, long after the effects of Delta-9-THC have worn off.

These metabolites can linger more than 90 days in some cases. For occasional users, an average of 13 days was recorded. Some people had metabolites detectable for just three days; others found the substances still in the urine after up to 29 days.

VII. PROHIBITED ALCOHOL CONCENTRATION 346.63(1)(b) and 940(b)

A. 301(46m) "Prohibited alcohol concentration" means one of the following BAC "while driving or operating a motor vehicle per 345.63(1)(b):

(a) If the person has 2 or fewer prior convictions, suspensions, or revocations, an alcohol concentration of 0.08 or more.

(b) If the person is subject to an ignition interlock order or if the person has 3 or more prior convictions, suspensions or revocations, an alcohol concentration of more than 0.02.

B. CURVE DEFENSE

1. JI 234 BLOOD ALCOHOL CURVE:

Evidence has been received that, within three hours after the defendant's alleged operation of a motor vehicle, a sample of the defendant's (breath)(blood) was taken. An analysis of the sample has also been received. **This is relevant evidence** that the defendant (had a prohibited alcohol concentration) (was under the influence) at the time of the alleged operating. Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

2. VERSUS JI 2663 where no curve defense and presumptions of 885.235 apply:

If you are satisfied beyond a reasonable doubt that there was .08 (breath) (blood) at the time the test was taken, **you may find from that fact alone** that the defendant was under the influence of an intoxicant or operating with a prohibited blood alcohol content at the time of the alleged operating, but you are not required to do so....

3. The issue ... is whether the presumed fact that defendant was under the influence of an intoxicant at the time of driving "more likely than not" flows from the proven fact of intoxication at time of testing. The trial judge was satisfied, under all the evidence before him, that this test was met. State v. Vick, 104 Wis2d 678, 312 N.W.2d 489 (1981). City of Baraboo v. Teske, 211 Wis.2d 891568 N.W.2d 653 (CT. APP. 1997)(unpublished)

4. Blood Alcohol Chart:

1. It is error to exclude the Blood Alcohol Chart. State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. APP. 1984)

2. JI 237:

....You should carefully consider this evidence along with all the other evidence in the case, giving it just such weight as you decide it is entitled to receive.

EVIDENTIARY CHEMICAL TESTS/REFUSALS

VIII. IMPLIED CONSENT

A. 343.305(2) IMPLIED CONSENT. Any person who drives or operates a motor vehicle upon the public highways of this state, ..., is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer... such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

B. 343.305(3)(a). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.

C. WHEN REQUEST CAN BE MADE BY LAW ENFORCEMENT OFFICER AND INDIVIDUAL SUBJECT TO REFUSAL PENALTIES FOR FAILURE TO SUBMIT TO TESTING:

1. UPON ARREST:

343.305 (3)(a): **Upon arrest** of a person for violation of s. **OWI (346.63(1)(a), Absolute Sobriety (346.63(2m)) or Commercial PAC**, or a local ordinance in conformity therewith, or for a violation of . **OWI Causing Injury (346.63(2) or (6)) or Causing Great Bodily Harm By Intoxicated Use (940.25), or Homicide by Intoxicated Use (940.09)** where the offense involved the use of a vehicle, or upon arrest subsequent to a refusal under par. (ar), a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2).

2. ACCIDENT CAUSING SUBSTANTIAL BODILY HARM:

343.305(ar)(1) If a person is the operator of a vehicle that is involved in an **accident that causes substantial bodily harm**, as defined in s. 939.22 (38), to any person, and a law enforcement **officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof**, the law enforcement officer may request the operator to provide one or more samples of his or her breath, blood, or urine and if the person refuses to comply they can be arrested 940.29.

3. ACCIDENT CAUSING DEATH or GREAT BODILY HARM:

343.305(5)(ar)(2) If a person is the operator of a vehicle that is **involved in an accident that causes the death of or great bodily harm to any person** and the law enforcement officer has **reason to believe that the person violated any state or local traffic law**, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine and if the person refuses to comply they can be arrested for a violation of 940.09 or 940.25..

D. BLOOD DRAWS GENERALLY:

1. 343.305(5)(b) Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63(1), (2m) or (5), or as provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.
2. Defendant has a constitutional right to cross examine the analyst performing the test- a lab supervisor familiar with the process will not suffice. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

3. Phlebotomist who draws blood does not have to testify, as long as the person who completes the report is subject to cross examination and the relevant chain of custody is established. *State v. Boyer*, 2011AP305–2011)(August 16, 2011)

E. REFUSAL HEARING ISSUES: 343.305(9)(a)(5)

1. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol...and whether the subject was lawfully placed under arrest.
 - a. The defendant can challenge reasonable suspicion for the stop because “without a legal stop” subject cannot be legally arrested. *State v. Anagnos*, 2010AP 1812 (July, 2011)
2. Whether the officer complied with 343.305(4) and read the Informing Accused Form to the subject.
 - a. A driver's "subjective confusion" over the right not to take the chemical test is not grounds for challenging the propriety of the warnings given prior to administering the test. There is a 3-part standard to be applied in determining the adequacy of the warnings. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), 95-1074. But see *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, 06-3163.
 - a. (1) Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver;
 - b. Is the lack or oversupply of information misleading;
 - c. Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

- b. When an officer exceeds the duty to give warnings prior to administering the test and gives erroneous information, it is the defendant's burden to prove by a preponderance of the evidence that the erroneous information caused the defendant's refusal. *State v. Ludwigson*, 212 Wis. 2d 871, 569 N.W.2d 762 (Ct. App. 1997), 97-0417.
 - a. Officer's statement that subject can refuse the station house test is a proper statement of the law. *Quelle, supra*.
 - c. Whether the accused driver comprehends the warnings is not part of the inquiry. A driver's hearing impairment must be taken into account and accommodated as is reasonably possible under the circumstances. *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, 99-1250.
3. Whether the person refused to permit the test.
- a. A verbal refusal to submit to a blood alcohol test is not required to find a refusal. Conduct may serve as the basis for finding a refusal. *State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997), 97-0169.
 - b. A mental disorder cannot justify a test refusal unless it is severe enough that the driver is deemed not to have refused at all. *State v. Hagaman*, 133 Wis. 2d 381, 395 N.W.2d 617 (Ct. App. 1986).
 - c. Willingness to submit to a blood alcohol test, subsequent to an earlier refusal, does not cure the refusal. *State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997), 97-0169.
 - d. There is no pretest right to counsel in OWI cases. There is no constitutional duty to inform suspected drunk drivers that the right to counsel does not attach to the implied consent statute. *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), 98-0915. Repeated requests for an attorney can amount to a refusal as long as the officer informs the driver that there is no right to an attorney at that point. *State v. Baratka*, 2002 WI App 288,

258 Wis. 2d 342, 654 N.W.2d 875, 02-0770. If an officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel before deciding whether to submit to the test, the defendant relied on the offering, and the officer nonetheless marked a refusal despite the defendant's reliance, then the refusal was reasonably made. State v. Verkler, 2003 WI App 37, 260 Wis. 2d 391, 659 N.W.2d 137, 02-1545.

4. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

An expressed fear of needles, without more, is not grounds to refuse, even when coupled with a willingness to take breath test. State v. Krajewski, 255 Wis.2d 98648 N.W.2d 385 (2002).

IX. UNCONSCIOUS PERSONS

A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent and one or more samples may be administered to the person.

X. RIGHT TO ALTERNATIVE TEST

A. 343.305 (5) ADMINISTERING THE TEST; ADDITIONAL TESTS.

(a) If the person submits to a test under this section, the officer shall direct the administering of the test. A blood test is subject to par. (b). The person who submits to the test is permitted, **upon his or her request, the alternative test provided by the agency or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test.** If the person has not been requested to provide a sample for a test the person may request a breath test to be administered by the agency or, at his or her own expense, reasonable opportunity to have any qualified person administer any test. The failure or inability of a person to obtain a test at his or her own expense does not preclude the admission of evidence of the results of any test administered at the request of law enforcement. If a person requests the agency to

administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform another test that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

1. The state's refusal to provide an alternative blood alcohol test may violate due process and result in suppression of the State's primary test. *State v. McCrossen*, 129 Wis. 2d 277, 385 N.W.2d 161 (1986).
2. An accused's request under sub. (5) (a) for his or her own test only requires the arresting agency to make the accused available to obtain the test, not to take an active part in obtaining the test. *State v. Vincent*, 171 Wis. 2d 124, 490 N.W.2d 761 (Ct. App. 1992).
3. An accused's request for an additional chemical test under Wis. Stat. § 343.305(5)(a) is not invalid solely because that request was made before and not after submitting to the test the law enforcement officer asked the accused to take. *State v. Schmidt*, 277 Wis.2d 561, 691 N.W.2d379(CT. APP. 2004)

XI. FORCED BLOOD DRAWS

- A. Warrantless blood draw from a person arrested for OWI is authorized under exigent circumstances exception to the warrant requirement of the Fourth Amendment based on *Schmerber v. California* , 384 U.S. 757 (1966).
- B. Warrantless blood draw authorized because “the dissipation of alcohol from a person’s bloodstream constitutes a sufficient exigency” when (1) draw taken at direction of law enforcement officer from a person lawfully arrested for OWI and (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) method used was reasonable and performed in a reasonable manner, the arrestee presents no reasonable objection to the blood draw. *State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399 (1993).

1. Offer to take a breath test does not make warrantless blood draw unreasonable. *State v. Krajewski*, 255 Wis.2d98, 648 N.W.2d 385 (2002)

XII. PBT's

A. 343.303 Preliminary Breath Screening Test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) or (2m) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s. 346.63 (7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1), (2m), (5) or (7) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6), 940.09 (1) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305 (3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3). Following the screening test, additional tests may be required or requested of the driver under s. 343.305 (3). The general penalty provision under s. 939.61 (1) does not apply to a refusal to take a preliminary breath screening test.

1. "Probable cause to believe" refers to a quantum of evidence greater than reasonable suspicion to make an investigative stop, but less than probable cause to make an arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), 97-3512.

B. A prosecutor's statement that the defendant failed a preliminary breath test was improper, but evidence that the defendant refused to take a

breathalyzer test was relevant and constitutionally admissible. *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980).

C. State v. Fischer: PBT and Right to Present a Defense

1. Under *State v. St. George*, 2002 WI 50, for a defendant to establish a constitutional right to the admissibility of proffered expert testimony, the defendant must satisfy a two-part inquiry determining whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion undermines fundamental elements of the defendant's defense. In an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the state's compelling interest to exclude that evidence. *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629, 07-1898. But see *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (2010).

2. The Wisconsin Supreme Court's decision in *Fischer* affirming the exclusion of the defendant's expert's testimony using PBT results involved an unreasonable application of federal law as determined by the United States Supreme Court. *Fischer v. Ozaukee County Circuit Court*, 741 F. Supp. 2d 944 (2010).

CHARGING/SENTENCING ISSUES

XIII. PRIOR OFFENSES TO BE COUNTED:

- A.** 343.307(1) The court shall count the following to determine the length of a revocation under s. 343.30 (1q) (b) and to determine the penalty under ss. 114.09 (2) and 346.65 (2):
- (a) Convictions for violations under s. 346.63 (1), or a local ordinance in conformity with that section.
 - (b) Convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.63 (1).

(c) Convictions for violations under s. 346.63 (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle.

(d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

(e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

(f) Revocations under s. 343.305 (10).

(g) Convictions for violations under s. 114.09 (1) (b) 1. or 1m.

1. 340.01(9r) defines “conviction” as an **unvacated adjudication** of guilt, or a **determination** that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of property deposited to secure the person's appearance in court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction.

a. Illinois supervision counts as prior conviction. State v. List, 277 Wis.2d 836, 691 N.W.2d 366 (CT.APP.2004)

b. Illinois suspension for “zero tolerance” counts as prior conviction even though suspension under same law in Wisconsin does not count as prior conviction. State v. Carter, 330 Wis.2d 1, 794 N.W.2d 213, 794 N.W.2d 213 (2010)

XIII. ADMISSABILITY OF PRIOR OFFENSES

A. While prior convictions are an element of a repeat PAC violation, admitting evidence of that element may not be proper. Admitting any evidence of prior convictions and submitting the element of the defendant's status as a prior offender to the jury when

the defendant admitted to the element was an erroneous exercise of discretion. *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997), 96-1973.

1. DOT certified driving transcript was admissible evidence that established the defendant's repeater status as an element of the PAC offense beyond a reasonable doubt. *State v. Van Riper*, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156, 03-0385.
2. A previous conviction for operating while intoxicated is a penalty enhancer, not an element of the crime. *State v. McAllister*, 107 Wis. 2d 532, 319 N.W.2d 865 (1982). But as to operating with a prohibited blood alcohol count, two or more prior convictions is an element of the crime of driving with a blood alcohol concentration of 0.02% or more. *State v. Ludeking*, 195 Wis. 2d 132, 536 N.W.2d 392 (Ct. App. 1995), 94-1527.

XIV. REOPENING PRIOR OFFENSES

- A. In an enhanced sentence proceeding predicated on a prior conviction, a defendant may collaterally attack the prior conviction when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer. *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994); *State v. Hahn*, 238 Wis.2d 889, 618 N.W.2d 528 (2000); *State v. Peters*, 2001 WI 74; 628 N.W.2d 797 (2001). Grounds for collateral attack:
 - a. The circuit court failed to address the defendant personally and specifically to ensure that the defendant: 1) made a deliberate choice to proceed without counsel, 2) was aware of the difficulties and disadvantages of self-representation, 3) was aware of the seriousness of the charge or charges against him, 4) was aware of the general range of penalties that could have been imposed upon him and 5) was competent to proceed without counsel. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel. *Peters*, 628 N.W.2d at 801; quoting *State v. Klessig*, 211 Wis.2d 194, 201, 564 N.W.2d 716 (1997). *Pickens v. State*, 96 Wis.2d 549, 563-4, 292 N.W.2d 601 (1980)
 - b. The particular facts and circumstances surrounding the case failed to establish that the defendant was fully aware of the full dangers and disadvantages of self-representation. *Iowa v. Tovar*, 124 S.Ct. 1379 (2004). The record must establish that the defendant must fully

understands the nature of the right to counsel and how it would apply in the circumstances.

XIV. VOIDING PRIOR OFFENSES

- A. If a circuit court tries a defendant as a first offender under Wis. Stat. §§ 346.63(1) and 346.65(2)(a) when in fact it is a second offense, where criminal penalties are required, the trial court lacks subject matter jurisdiction to try the defendant as a first-time offender. *Walworth County v. Rohner*, 108 Wis.2d 713, 324 N.W.2d 683 (1982).

XV. STATUTE OF LIMITATIONS

939.74(1) governs the time period within which prosecution for a crime must begin. It states that prosecution for a misdemeanor must be commenced within 3 years after the commission of the crime. *Id.*

DISCOVERY AND OPEN RECORDS:

- XVI. OPEN RECORDS: Pursuant to sec. 19.35, Stats., we hereby request that you or your designee(s) provide copies of the following records, *as applicable*, as that term is defined in sec. 19.32(2), Stats.,

A. BLOOD CASES: To State Laboratory of Hygiene:

1. The final report form, analysis worksheets for the analytical run including loading worksheet, gas chromatogram output for the subject analysis, as well as each control sample and standard analyzed during the run which included the subject test;
2. The ethanol procedure manual utilized by the analyst who tested the subject's blood; and
3. A copy of the maintenance and service logs for the machine and other equipment used to analyze the sample.

B. BREATH CASES: To Chemical Test Section:

1. Maintenance reports relating to the Intoximeter EC/IR machine described above, including all EC/IR maintenance and repair reports from (DATE 6 MOS. PRIOR FROM DATE OF VIOLATION), to the present.
2. All assay reports relating to the above simulator solution and dry gases used number from (DATE 6 MOS. PRIOR) to the present.

3. All Intoxnet data, including, but not limited to, all subject files, accuracy checks, maintenance files, diagnostic, operational and calibration errors, and quick tests from (DATE 6 MOS. PRIOR) to the present.
4. All Intoximeter EC/IR Service and Field Activity Reports (SP4775) relating to repairs of the Intoximeter EC/IR machine described above as well as copies of all lab reports from (DATE 6 MOS. PRIOR) to the present.
5. All pre-installation testing certifications including copies of test cards with all printouts.
6. All site installation certifications.

C. ALL CASES: To Law Enforcement Agency

1. All police officers' reports or incident reports, including any internal use of force reports;
2. Any statement made by (D) which is recorded or transcribed;
3. The booking card or sheet or that portion of the booking log for (DOV), regarding (D);
4. handwriting sample card;
5. Witness list;
6. Witness report;
7. Any photographs of (D);
8. Property inventory;
9. Money inventory;
10. Release form(s);
11. A copy of that portion of the jail log for the day of (DOV), regarding (D);
12. Any documents signed by (D) at the (DEPT);
13. A copy or transcript of the dispatch tape, records and cards regarding the arrest of (D) on (DOV) at approximately (TOV) .m., by (OFFICER) on/at (LOC);
14. A copy of any and all video and audio tape recordings, including but not limited to, recordings from 911 dispatch, squad mounted cameras, the stop, search, arrest, and/or subsequent statements made by (D) on (DOV).

D. TRAFFIC CAMERAS: WITHIN 72 Hours

1. Contact: State Traffic Operations Center
433 W. St. Paul Avenue, Suite 300
Milwaukee, Wisconsin 53203

Phone: (414) 227-2166
Email: 511wi@dot.wi.gov

2. Available for Fond du Lac, Milwaukee-area, Madison-area, Green Bay-area, Rock County and Wausau area.

E. NHTSA STUDENT MANUEL: DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING

National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161
www.ntis.gov
1-800-553-6847
<http://www.ntis.gov/products/dwi.aspx> (Student \$150, Instructor \$200)

F. CERTIFIED WEATHER DATA

1. National Weather Service
<http://weather.gov/>
2. MILWAUKEE AREA:
Milwaukee/Sullivan Forecast Office
N3533 Hardscabble Rd.
Dousman, WI 53118
262 965-2074
3. GREEN BAY AREA:
2485 South Point Rd.
Green Bay, WI 54313-5522
920 494-2363

G. ACCIDENT REPORTS:

Wisconsin Department of Transportation
Accident Section
(608) 266-8753
<http://www.dot.state.wi.us/>

4. Report detailing Accident History at Certain Location/Intersection detailing for specified date range type of accident, manner of collision, injuries/deaths, road conditions, age/sex, what drivers doing, citations issued, pedestrian action:
5. Law Enforcement Officer's Instruction Manual For Filling Out Wisconsin Motor vehicle Accident Report Form
<http://www.dot.wisconsin.gov/drivers/docs/manual-mv4000.pdf>

H. MISCELLANEOUS DRIVER INFORMATION WISCONSIN DOT

1. Driver records:
driverrecords.dmv@dot.wi.gov
(608) 266-2353
2. Medical Unit
(608) 266-2327
3. Revocations/Suspensions
(608) 266-2261
3. Titles
(608) 266-1466

I. AERIAL IMAGERY

The Wisconsin Department of Transportation Surveying and Mapping Section has recent and historical black and white vertical aerial imagery of the entire state of Wisconsin to assist in the design of highways and other transportation improvements. This aerial imagery is available for purchase.

Email: kathryn.ryan@dot.wi.gov
(608) 246-5392
Fax: (608) 245-8959