

# **Back to Basics:**

**What must be proven at an OWI  
trial**

**Hon. John Hyland  
Dane County Circuit Court**

**Hon. Todd E. Meurer  
Western Dane County Municipal Court**

# Trial Judge Cheat-sheets

---

- Given to municipal judges to use during trials
- Detailed description of each legal element
- Checklist form for each of the three OWI offenses

# Elements – NOT Penalties

---

Basic legal jurisdiction of OWI offenses:

OWI first offenses are generally civil.

Second and subsequent are criminal.

# Exceptions to civil first-time OWIs:

- If child passenger (less than 16 years old) is in the vehicle



- If injuries

## **2<sup>nd</sup> OWI = 1<sup>st</sup> OWI**

When defendant's 1<sup>st</sup> OWI is 10 years old or older, then a subsequent OWI arrest will be prosecuted as a “second” 1<sup>st</sup> Offense.

Next offense will be a 3<sup>rd</sup>!

# Wisconsin's Statutes for OWI

---

**1970:** test result provides presumption of under the influence. (.15%)

**1980:** reduced to .10%

**1982:** two kicks at the can!! “Per se” offense is created. (.10%)

**2003:** reduced to .08%

**2003:** Restricted Controlled Substance “Per se” offense is created

# The OWI Trilogy

---



OWI §346.63(1)(a)



PAC §346.63(1)(b)



RCS §346.63(1)(am)



# Basic Trilogy Offenses

---

OWI

**§346.63(1)(a)**

Operating While  
Under the Influence  
of an Intoxicant...





# Basic Trilogy Offenses

---



**PAC**

**§346.63(1)(b)**

Operating with a

**Prohibited Alcohol  
Concentration**

# Basic Trilogy Offenses

---



RCS

**§346.63(1)(am)**

Operating with a  
Detectable Amount of a  
Restricted Controlled  
Substance

# Convictions? §346.63(1)(c)

Can be charged and convicted with all **3**  
offenses, but can only be  
sentenced for **1**

# **Elements that all Three Offenses have in Common**

# "Drive" §346.63(3)(a)

Physical control  
over the **speed** and  
**direction** of motor  
vehicle while in  
**motion**



# "Operate"

## See §346.63(3)(b)

Physical manipulation or activation of controls necessary to put in motion



# Where do the 3 OWI laws apply?

## §340.01(22)

**Highways** – All public ways open to vehicular traffic including the shoulder and right-of-way beyond the shoulder



# **Besides Highways, where else?**

Premises held open to the public for  
use of their motor vehicles

**§346.61**



# Premises held open to the public for use of their motor vehicles?

---

All premises provided by employers to employees

All premises provided to tenants of rental housing in buildings of 4 or more units

Regardless of private or public ownership

Regardless whether a fee is charged

Does NOT include private parking areas at farms or single-family residences

# **Elements of Each of the Three Offenses**

# OWI

## Operating While Under the Influence of an Intoxicant Elements of §346.63(1)(a)

Under the influence = defendant was rendered incapable of safely driving or operating a motor vehicle

No person may not drive or operate a motor vehicle while under the influence of:

---

an intoxicant,

a controlled substance,

a controlled substance analog

any combination of an intoxicant, a controlled substance and a controlled substance analog,

under the influence of any other drug if they cannot safely drive, or

under the combined influence of an intoxicant and any other drug if they cannot safely drive

# Under the Influence



Means that the defendant's ability to operate a vehicle is **impaired**

# Under the Influence

---

Not every person who has consumed an alcoholic beverage is "under the influence"...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.

# Under the Influence

---

**NOT** necessary to show specific acts of unsafe driving

Only the person's ability to safely control the vehicle was **impaired**



Test Result  
§885.235(1g)(c)



**prima facie  
evidence**

0.08 or more is prima facie evidence that  
defendant was under the influence of an  
intoxicant



# Under 0.08 but higher than 0.04



Still relevant  
evidence on issue  
of intoxication

- §885.235(1g)(b)

# Elements of Prohibited Alcohol Concentration §346.63(1)(b)

- Drive or operate
- Prohibited Alcohol  
Concentration 0.08 or higher  
§340.01(46m)

# Elements of Restricted Controlled Substance § 346.63(1)(am)

---

➤ Drive or operate

➤ While having a **detectable** amount of a restricted controlled substance in his or her **blood**

# Restricted Controlled Substance means any of the following:

---

§340.01(50m)

(a) A controlled substance included in **Schedule I** under [ch. 961](#) other than a tetrahydrocannabinol.

(am) The **Heroin** metabolite 6-monoacetylmorphine.

(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

# OTHER BASIC LEGAL ISSUES TO CONSIDER?

---

- Field Sobriety Tests (FST)
- Preliminary Breath Tests (PBT)
- Refusals
- Warrants v Implied Consent
- The “Curve” Defense
- Administrative Suspension

# Field Sobriety Tests



Defendant is not required to take FSTs  
If refuses, the fact can be admitted at trial as consciousness of guilt

# Preliminary Breath Test (PBT)

- Can **only** be used for **Probable Cause** to arrest.
- **Can Not** be used at trial as proof of guilt §343.303



# Implied Consent

---

It is the law of Wisconsin that any person operating a motor vehicle has given consent to testing of their blood, breath or urine for determining the presence of alcohol or drugs. §343.305(2) Wis. Stats.



# Refusals

---

- Only happens in the context of “Implied Consent”.
- Only happens after a lawful arrest and after reading of Informing the Accused Form!!!

# After a Refusal

---

- Officer gives a Notice of Intent to Revoke to the person's operating privileges
- This **Notice** informs the person that they can request a hearing within **10 days** of the notice.

# Refusal Hearing

---

## Issues:

- Was there **probable cause** that the defendant was operating while under the influence?
- Was defendant **arrested** for OWI/PAC/OCS?
- Did officer properly read the “**Informing Accused**” form?
- Did defendant **refuse** to take the test?

# Only Defense?

---

If Defendant can prove by a preponderance of the evidence that he or she has a

**physical inability to submit to the test**

(unrelated to use of drugs or alcohol)



# Forced Blood Tests

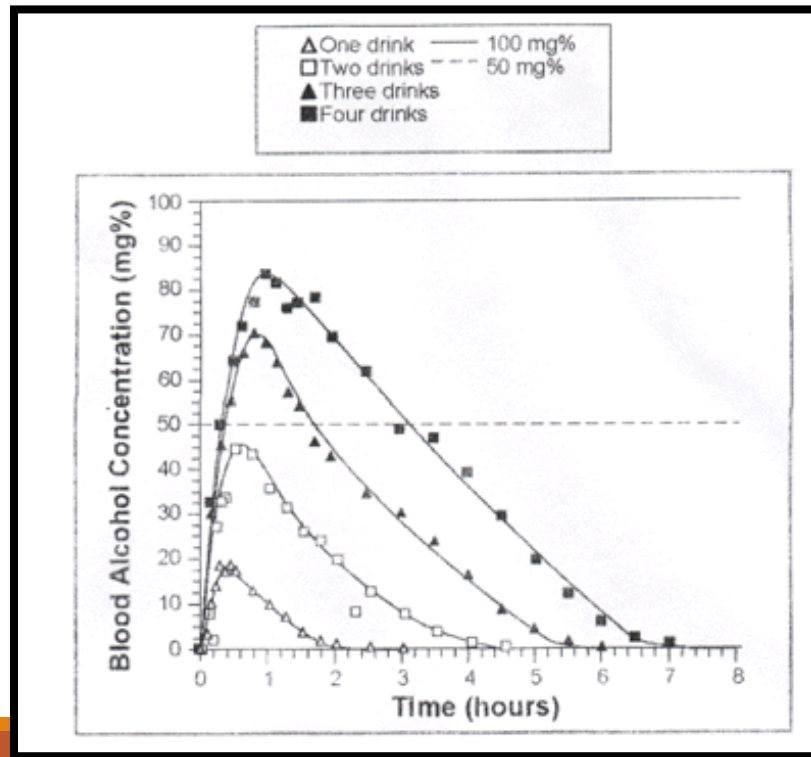
---

- **NOT** done under Implied Consent Law.
- 4<sup>th</sup> Amendment - Warrant required.... unless exigent circumstances exist.
- Fact that alcohol is being metabolized by body is NOT an exigent circumstance allowing blood draw without a warrant. Consequently, a search warrant is usually required. **Muni Judges may NOT issue a search warrant!!**

# “CURVE” DEFENSE

## Retrograde Extrapolation Analysis

Def's alcohol level was LOWER at time of driving than at time of test.



# Administrative Suspension

---

When defendant submits to chemical test, and the test result is .08% or more for alcohol or there's a detectable amount of RCS...

Then a Notice of **Administrative** Suspension is given to defendant and sent to DOT.

# Notice of Admin. Suspension

---

30 days!

Operating privileges suspended by DOT 30 days after the arrest for 6 months.  
Immediately eligible for occupational.

10 days!

Person has only 10 days to request that DOT hold a review of the suspension



# Review of Administrative Suspension by DOT

---

- If person requests a review of suspension by DOT. Review at DOT is held within 30 days.
- If DOT Hearing Examiner upholds the suspension, the person can request a judicial review of the Administrative Suspension – Request must be made within 20 days of DOT's decision.

