### 28.13 REFUSAL TO SUBMIT TO TESTING – DRIVING UNDER THE INFLUENCE

§ 316.1939, Fla. Stat.

**To prove the crime of Refusal to Submit to Testing – Driving Under the Influence, the State must prove the following six elements beyond a reasonable doubt:**

Give 1a or 1b or both as applicable.

**1. A law enforcement officer had probable cause to believe** (defendant) **[drove] [was in actual physical control of] a motor vehicle in this state while**

**a. under the influence of [an alcoholic beverage] [**(a chemical substance listed in 877.111 Fla. Stat.)**]** **[**(a controlled substance listed in Chapter 893)**] to the extent** (Defendant’s) **normal faculties were impaired.**

**b. [his] [her] [breath] [blood] alcohol level was .08 or higher.**

**2. The law enforcement officer lawfully arrested** (defendant) **for Driving Under the Influence.**

**3.** (Defendant) **was informed that if [he] [she] refused to submit to a [chemical] [physical] test of [his] [her] [breath] [urine], [his] [her] privilege to operate a motor vehicle would be suspended for a period of one year, or, in the case of a second or subsequent refusal for a period of 18 months.**

**4.** (Defendant) **was informed that it is a misdemeanor to refuse to submit to a lawful test of [his] [her] [breath] [urine], if either [his] [her] driving privilege had been previously suspended, or if [he] [she] was previously fined under s. 327.35215, for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].**

**5.** (Defendant)**, after being so informed, refused to submit to a [chemical] [physical] test of [his] [her] [breath] [urine] when requested to do so by a [law enforcement officer] [correctional officer].**

**6.** (Defendant’s) **driving privilege had been previously suspended or [he] [she] was previously fined under s. 327.35215 for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine].**

BUI refusal

**s. 327.35215 is the Florida statute that covers refusal to submit to testing after an arrest for Boating Under the Influence.**

Inference. § 316.1939(3), Fla. Stat. Give if applicable.

**You are permitted to conclude that** (defendant’s) **driving privilege had been previously suspended for a prior refusal to submit to a lawful test of [his] [her] [breath] [blood] [urine] if a record from the Department of Highway Safety and Motor Vehicles shows such a suspension.**

§ 316.003, Fla. Stat. Some of these terms have their own statutory definitions, which should be given if necessary.

**“Motor vehicle” means any self-propelled vehicle not operated upon rails or guideway[, but not including any bicycle, electric bicycle. motorized scooter, electric personal assistive mobility device, mobile carrier, personal delivery device, swamp buggy, or moped].**

**“Vehicle” is every device, in, upon or by which any person or property is, or may be, transported or drawn upon a highway[, except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks].**

Mathis v. Coats, 24 So. 3d 1284 (Fla. 2d DCA 2010).

**“Probable cause” exists where the totality of circumstances, from the perspective of the law enforcement officer’s knowledge, training, and experience, gave the officer reasonable grounds and a fair probability to believe that a crime had been committed.**

Give if applicable. The option of “on a vehicle” pertains to vehicles such as motorcycles.

**“Actual physical control” means the defendant must be physically in or on the motor vehicle and have the capability to operate the motor vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time.**

Lesser Included Offense

No lesser included crimes have been identified for this offense.

Comments

Where the lawfulness of the arrest is at issue, a special instruction will be necessary.

This instruction was adopted in 2007 [965 So. 2d 811] and amended in 2013 [131 So. 3d 692], 2019 [262 So. 3d 59], on October 2, 2020, and on January 7, 2022.