### 28.13(a) REFUSAL TO SUBMIT TO TESTING – BOATING UNDER THE INFLUENCE

§ 327.359, Fla. Stat.

**To prove the crime of Refusal to Submit to Testing – Boating 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) **operated [or was in actual physical control of] a vessel 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 [his] [her]** **normal faculties were impaired.**

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

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

**3.** (Defendant) **was informed that if [he] [she] refused to submit to a [chemical] [physical] test of [his] [her] [breath] [urine], [he] [she] would be subject to a fine of $500.**

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

§ 327.02, Fla. Stat. Some of these terms have their own definitions in § 327.02, Fla. Stat., which should be given if necessary. See State v. Davis, 110 So. 3d 27 (Fla. 2d DCA 2013) (holding that for a BUI prosecution, the state is not required to prove that the boat defendant was operating was subject to a license tax).

**“Vessel” means a boat and includes every description of watercraft, barge, and airboat, other than a seaplane, on the water, used or capable of being used, as a means of transportation on water.**

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.**

§ 327.02, Fla. Stat. Give if applicable. “Operate” means to be in charge of or in command of [or in actual physical control of] a vessel upon the waters of this state, or to exercise control over or to have responsibility for a vessel’s navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state.

**“Actual physical control” means the defendant must be physically in or on the vessel and have the capability to operate the vessel, regardless of whether [he] [she] is actually operating the vessel 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 on January 7, 2022.