

28.11(a) DRIVING WHILE DESIGNATED AS A HABITUAL TRAFFIC OFFENDER

§ 322.34(5), Fla. Stat.

To prove the crime of Driving While Designated as a Habitual Traffic Offender, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **drove a motor vehicle upon a highway in this state.**
2. **At the time, [he] [she] was designated as a habitual traffic offender.**

§ 322.01, Fla. Stat. Some of these terms (such as “vehicle” and “electric bicycle”) have their own statutory definitions, which should be given if necessary.

“Drive” means to operate or be in actual physical control of a motor vehicle in any place open to the general public for purposes of vehicular traffic.

“Motor vehicle” means any self-propelled vehicle, including a motor vehicle combination, not operated upon rails or guideway, excluding vehicles moved solely by human power [, motorized wheelchairs, and electric bicycles].

State v. Tucker, 761 So. 2d 1248 (Fla. 2d DCA 2000).

“Highway” means the entire width between the boundary lines of every way or place if any part thereof is open to the use of the public for purposes of vehicular traffic. [A privately owned parking lot, that is open to public use by vehicles, is considered to be a highway.]

“Habitual traffic offender” is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that [he] [she] has been designated a Habitual Traffic Offender.

The option of “on a vehicle” pertains to a vehicle such as a motorcycle.

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

Lesser Included Offenses

DRIVING WHILE DESIGNATED AS A HABITUAL TRAFFIC OFFENDER — 322.34(5)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
No Valid Driver’s License		322.03	28.9
	Attempt	777.04(1)	5.1

Comments

A person driving a moped upon a highway requires a driver license. *Soto v. State*, 711 So. 2d 1275 (Fla. 4th DCA 1998).

§ 322.34(5), Fla. Stat. states that Driving While Designated as a Habitual Traffic Offender (HTO) is a third degree felony. However, § 322.34(10), Fla. Stat. creates the possibility that the crime could be a misdemeanor depending on whether the defendant has a prior forcible felony conviction and the reasons for the driver license suspensions that led to the HTO designation. As of June 2025, it was unclear whether a withhold of adjudication for a forcible felony qualifies as a conviction.

If the charging document contains an allegation of one or more prior forcible felony convictions, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty, and if the prior forcible felony conviction is determined by a judge or appellate court to be an element, the historical fact of a conviction shall be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

If the defendant does not have a forcible felony conviction and if the HTO designation resulted from three driver license suspension cases that came about because of reasons listed in § 322.34(10)(a)1.-5., Fla. Stat., this crime will be a misdemeanor. However, if at least one of the three prior driver license suspensions that resulted in the HTO designation was for a reason other than a circumstance listed in § 322.34(10)(a)1.-5., Fla. Stat., this crime will be a felony, regardless of whether the defendant had a prior forcible felony conviction. *See Wyrick v. State*, 50 So.3d 674 (Fla. 5th DCA 2010).

This instruction was adopted in 2007 [958 So. 2d 361] and amended in 2013 [131 So. 3d 692], on April 1, 2020, on October 2, 2020, on December 21, 2022, and on June 27, 2025.