

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 five 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 a refusal to submit to a lawful test of [his] [her] [breath] [urine] is a misdemeanor of the second degree, or 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], is a misdemeanor in the first degree.**
- 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].**

BUI refusal

§ 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, on January 7, 2022, and on June 12, 2026.