

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.