



**MIDDLETON POLICE  
DEPARTMENT**

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POLICY  
**6.2.06**

SUBJECT: **OWI - Operating While Impaired**

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**PURPOSE**

This policy establishes procedures for the detection, testing, arrest, and processing of impaired drivers due to intoxicants, controlled substances, or any other drugs.

**POLICY**

Impaired drivers are a serious threat to public safety. It is department policy that officers will actively apprehend persons operating vehicles while under the influence of intoxicants, controlled substances or any other drugs in accordance with WI ss. [346.63](#) and all related sub sections as well as [346.71\(2\)](#) and [343.305](#) and all related sub sections.

**DEFINITIONS**

"**DRIVE**" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion [346.63\(3\)\(b\)](#).

"**OPERATE**" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion [346.63\(1\)\(c\)](#).

"**VEHICLE**" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile, an all-terrain vehicle, and an electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute [340.01\(74\)](#).

"**MOTOR VEHICLE**" means a vehicle that is self-propelled, including a trackless trolley bus, except that a snowmobile, ATV, electric personal assistive mobility device shall only be considered a motor vehicle for purpose made specifically applicable by statute [340.01\(35\)](#).

"**CRIMINAL RECKLESSNESS,**" in part, means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. See [939.24](#) for additional information.

"**CRIMINAL NEGLIGENCE**" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another. See [939.25](#) for additional information.

"**INJURY**" is not defined in state statutes. The Dane County District Attorney's Office does not generally consider soft tissue damage as an injury for the purposes of charging a violation of [346.63\(2\)](#). These are reviewed on a case-by-case basis and factors such as missed work/school may be considered as evidence of an injury.

"**SUBSTANTIAL BODILY HARM**" means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth [939.22\(38\)](#).

"**GREAT BODILY HARM**" means bodily injury which creates a high probability of death or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury [939.22\(14\)](#).

"**UNDER THE INFLUENCE OF AN INTOXICANT**" means that the actor's ability to operate a vehicle or handle a firearm or air gun is materially impaired because of his or her consumption of an alcoholic beverage, a controlled substance, a controlled substance analog under ch. [961](#), any other drug under [939.22\(42\)](#).

"**PRIVATE ROAD OR DRIVEWAY**" is every way or place in private ownership and used for vehicular travel only by the owner and those having expressed or implied permission from the owner and every road or driveway upon the grounds of public institutions other than public schools, as defined in s. [115.01 \(1\)](#), and institutions under the jurisdiction of the county board of supervisors [340.01\(46\)](#).

"**ROADWAY**" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed, or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term "roadway" refers to each roadway separately but not to all such roadways collectively [340.01\(54\)](#).

"**STREET**" means every highway within the corporate limits of a city or village except alleys [340.01\(64\)](#).

"**HIGHWAY**" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. [115.01 \(1\)](#), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. [\(46\) 340.01\(22\)](#). (Chapter 346 applies exclusively upon highways except as otherwise expressly provided in Chapter 346 [346.02\(1\)](#).)

## **PROCEDURES**

### **Detection**

1. Officers will be alert for signs of impairment. When observing such behavior, officers will gather evidence to stop the vehicle; officers will not permit unsafe driving that endangers others.
2. Upon contact with the operator, officers will watch for signs of impairment and shall request a backup unit if one is available.
3. Officers will note the demeanor, actions of the suspect such as speech, balance, attitude, and odors.

### **Tests and Screening**

1. Officers will attempt field sobriety tests on drivers suspected of being OWI; tests should be conducted at the scene unless other factors necessitate moving. When possible, tests should be on a flat, lighted area out of traffic and conducted in a consistent manner.
2. Unless the driver is uncooperative or physically unable to perform, tests will be given as follows:
  - a. Standardized Field Sobriety Tests (SFST): horizontal gaze nystagmus (HGN), walk/turn (heel to toe), and one leg stand.
  - b. Officers not trained in SFST shall request an officer that has been trained to administer SFST to the operator.
  - c. Officers may use other optional tests including, but not limited to, alphabet recital, counting backwards, finger to nose, and Romberg balance.
  - d. Officers may use a Preliminary Breath Test (PBT).
3. If the officer suspects that the person may be under the influence of a controlled substance or other drug, the officer should administer both SFST's and non-standard FST's, and attempt to contact a DRE to perform an evaluation (especially for a serious crash investigation).

### **Arrest**

1. The officer will decide if there is probable cause to arrest based on SFST, other tests and his/her observations. If arrested, the driver will be handcuffed and searched, while the driver is at the scene, and will remain handcuffed for transport unless extenuating circumstances are present. If the officer is able to articulate reasonable suspicion to believe that the vehicle might contain evidence of the arrested offense(s), s/he may lawfully conduct a search of the vehicle for evidence supporting the OWI charge, alcohol, and/or open containers, etc. (*State v. Coffee*).
2. If the officer suspects that the person may be under the influence of a controlled substance or other drug, the officer will place the person under arrest and may attempt to arrange for a DRE.
3. In the case of a crash involving serious injury or death, blood shall be taken from every involved operator where alcohol or drugs are detected. In other circumstances, officers shall make every attempt to obtain a blood sample with the consent of the operator involved in a serious injury or fatality.
4. In the case of a crash involving serious injury or death, notification shall be made to the Detective Lieutenant, Operations Captain, and the District Attorney's Office on-call DA. A crash reconstruction team should be consulted in each of these cases as well.

### **Arrestee's Vehicle**

1. The officer will attempt to secure the person's vehicle and its contents prior to leaving the scene if it is legally parked.
2. If there is no sober passenger in the vehicle that possesses a valid driver's license and with the owner/driver's permission, it may be left legally parked; if it is illegally parked please refer to the tow policy.
3. If there is a sober passenger in the vehicle with a valid driver's license, it may be turned over to such person if the driver/owner consents.
4. This does NOT mandate release if the officer wants the vehicle for evidence.
5. If there are other occupants in the vehicle and it is being secured or towed, the officer will attempt to make reasonable arrangements for them.

6. If the vehicle has been involved in a crash that results in serious bodily injury or death, the vehicle must be taken to a secure impound facility and held pending release by the District Attorney's Office.

### **Chemical Tests**

1. The Department designates the breath test as the primary chemical test of intoxication for all OWI related offenses except those involving suspected drugs, great bodily harm, or death.
2. If drug use is suspected, blood should be considered as the primary test as it is the only means to quantify the level of drugs present. As you would for alcohol cases, ask relevant what, when, and how much questions for drugs. If you suspect a specific drug, not only put the facts and circumstances in your report, it is helpful to technicians if you identify the suspected drug on the test document.
3. Prior to requesting a person to submit to such test, the officer will inform the driver of the charge they will be receiving a citation for and take a citation number.
4. The officer will read the driver the Informing the Accused form and should avoid further explanation or interpretation of the form. If consent is given, an appropriate test is administered. If the subject does not speak English, the officer should attempt to locate a translator or utilize the language line.
5. Blood can be drawn from an unconscious person pursuant to exigent circumstances or pursuant to a warrant. Do not read the Informing the Accused form to an unconscious driver. Attempt to obtain a warrant unless exigent circumstances exist. If there is doubt, consider consulting with the on-call Assistant District Attorney.
6. If charged with any criminal OWI related offense and the person refuses a test, a search warrant for a blood sample should be completed. See OWI Search Warrants.
7. If the results show a prohibited alcohol concentration or prohibited amount of some form of drug, the officer will issue a citation for such charge and/or refer the data to the District Attorney if the driver was charged with a criminal offense.

### **Post Test/Refusal Processing**

1. Notice of Intent to Revoke - completed by officer, read to the driver refusing a test and issued a copy.
2. Notice of Intent to Suspend - completed by officer, read to the driver, and issued a copy, if the chemical test shows a prohibited alcohol concentration. If the results are delayed, the form should be mailed. Officers should not complete the "notice date" until the form is mailed.
3. Alcohol/Drug Influence Report - completed by officer, if Miranda is waived, questions may be asked of the driver.

### **Release of Driver after Processing**

1. Drivers may be released to a responsible sober adult who accepts responsibility for the driver. Persons accepting responsibility must read and sign a Release Form. If the person refuses to sign the form, the driver will not be released.
2. Drivers who do not have a responsible party shall be transported to jail and confined on a twelve-hour hold.

### **INTOXICATED DRIVERS INVOLVED IN INJURY ACCIDENT**

Unique circumstances exist when an officer suspects that a driver, involved in an injury or fatal accident, is intoxicated. Officers are not likely to regularly encounter these situations and thus should be aware that special procedures are to be followed. This policy deals with those procedures.

### **346.63(2) Causing Injury by OWI**

#### *Elements*

1. Defendant must have driven or operated a motor vehicle.
2. Defendant must have been under the influence of an intoxicant (alcohol, drugs, or combination).
3. Defendant must have caused **injury** to another person.

#### *Procedure*

For cases involving violations of [346.63\(2\)](#), standard OWI procedures are followed (UTC, Informing the Accused, etc.) Upon a refusal and barring exigent circumstances greater than the basic fact that alcohol dissipates quickly in the bloodstream, obtain an OWI search warrant.

### **940.25 – Great Bodily Harm by Intoxicated Use of a Vehicle**

#### *Elements*

1. Defendant must have operated a vehicle.
2. Defendant must have been under the influence of an intoxicant (alcohol, drugs, or a combination).
3. Defendant's operation of a motor vehicle must have caused **great bodily harm** to another.

#### *Procedure*

1. The ISB Lieutenant shall be contacted as soon as practical following any fatal or serious injury crashes where the survival of involved parties may be in question to determine what, if any, detective resources are needed. The Operations Captain should also be notified when practical.
2. The on-duty ADA should regularly be consulted in all serious injury or fatal crashes (██████████).
3. Where there is probable cause, the operator should be arrested (no citation) for violation of [940.25](#) (great bodily harm by intoxicated use of a vehicle), read the Informing the Accused, and taken to a medical facility for a blood draw, following normal procedures. Upon refusal, see search warrant procedure. Apply for a search warrant in cases involving unconscious drivers for all OWI related offenses.
4. In the case of a crash involving great bodily harm or death, where the officer has reason to believe that the operator violated any state or local traffic law, but does not yet have probable cause for arrest under 940.25, the officers should seek to obtain written consent. It is recommended that the on-duty ADA be consulted if this step is reached.
5. If the operator was taken to a medical facility for injuries as a result of the crash, probable cause for OWI has not been met, and the operator did not give consent, officers/detectives should request a hold on any blood drawn for medical purposes so that a search warrant can be obtained if probable cause is met through follow up investigations.

### **940.09 Homicide by Intoxicated use of Vehicle**

### ***Elements***

Same as 940.25 except that the defendant must have caused the death of another.

### ***Procedure***

Same as 940.25

Officers are reminded to:

1. Properly identify defendants and to document the method of identification.
2. Establish that the defendant was actually the driver using driver and witness statements, physical evidence, and admission by the defendant.
3. Establish at what time the accident happened using driver and witness statements and police records. In cases where persons involved are uncertain of the time of the accident, they may be able to state that the accident happened so many minutes before the police arrived.

### **OWI SEARCH WARRANT**

In light of *Missouri v. McNeely*, a Search Warrant is required for a forced OWI blood draw, absent exigent circumstances greater than the basic fact that alcohol dissipates quickly in the bloodstream (although a defendant may create their own exigency by withdrawing consent late in the process). In all OWI cases departmental policy specifies that a blood draw is required upon refusal to submit to testing. Effective March 19, 2021 the OWI Search Warrant procedure is as follows:

1. Read the “Informing the Accused” form to the defendant as soon as practical. If the defendant consents, proceed with testing under implied consent. If the defendant refuses or stands mute, follow the procedure for obtaining a Search Warrant, and then complete the test.
2. Fill in the Electronic OWI Search Warrant Form.
3. Use Adobe Acrobat’s “**Save As...**” action to save the filled in form as an editable PDF file, in case changes are needed after the duty judge reviews it.
4. Using Acrobat’s **Print** action “print” the filled in form using the PDF creator that appears in the printer list in the printing dialog box. This creates a non-editable PDF file.
5. Attach the non-editable PDF file to an e-mail and send it to [REDACTED]
6. Contact the Duty Judge and advise that you are seeking an OWI Blood Draw Warrant and have e-mailed the electronic form. This call need not be recorded.
  - a. The Duty Judge should be contacted at his/her office number during business hours (8:00 AM-4:30 PM Monday through Friday). The Duty Judge schedule can be found at [REDACTED] and the office numbers can be found at [REDACTED].
  - b. Outside of business hours, the Duty Judge can be called directly at [REDACTED]. If the Duty Judge cannot be contacted at this number, you should call the Dane County Communications Center for assistance.
7. The judge will either review the form while you are on the phone or take your number and call you back.

8. The judge will swear you over the phone to the affidavit you sent. This call need not be recorded.
9. The judge will decide whether there is probable cause to issue the warrant. If it is insufficient and you have additional facts you will have to go reopen the saved, editable PDF file, add more information and repeat steps 3-5.
10. If the judge finds probable cause and issues the warrant the judge will sign it electronically and return it by reply e-mail.
11. You must then timestamp the endorsement, either with a PDF annotation tool or by printing the document and handwriting the time, and if necessary, correcting the date received.
12. When you execute the warrant sign, date, and timestamp the executed warrant.
13. File the warrant return as you would any warrant. When you do, be sure to include the affidavit, the warrant, and the return. There will not be a recording to file because using this process does not require a recording.
14. Also see OWI Flow Chart and [968.12\(3\)](#).

## **USE OF DRUG RECOGNITION EXPERT (DRE)**

The purpose of this section is to improve enforcement and deter impaired driving by recognizing signs of drugs other than alcohol and using a trained Drug Recognition Expert (DRE).

### **Definitions**

***Drug Recognition Expert (DRE)*** - A law enforcement officer who has successfully completed the National Highway Traffic Safety Administration (NHTSA) approved curriculum for the Drug Evaluation and Classification process, and is certified by the NHTSA and the International Association of Chiefs of Police as a Drug Recognition Expert.

***Drug Evaluation and Classification (DEC)*** - A systematic, standardized method of examining a suspect to determine whether the person is under the influence of one or more categories of drugs.

***Restricted Controlled Substance*** - [State Statute [340.01\(50m\)](#)] Any of the following: a controlled substance included in schedule I under Ch. 961 other than a tetrahydrocannabinol, a controlled substance analog as defined in s. [961.01\(4\)\(am\)](#) of a controlled substance, cocaine or any of its metabolites, methamphetamine, or delta—9—tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per mL of blood.

### **DRE Procedure**

1. Patrol officer makes initial contact with suspect. This normally occurs via a traffic stop, but may occur through any police contact – complaint received, disabled vehicle, accident investigation, etc.
2. Observations and Indicators: During contact with the suspect, the officer should look for clues or other signs of drug use, including but not limited to:
  - a. Drugs or paraphernalia in the vehicle.
  - b. Drugs or paraphernalia on suspect's person.
  - c. Observations of suspect's speech, eyes, mannerisms, and/or balance.
  - d. Needle marks or scratch marks on suspect.

- e. Distinctive odor (particularly of THC).
  - f. Lack of odor of intoxicants.
3. Field Sobriety Testing and Arrest: Officer shall proceed as per OWI policy. If probable cause exists, arrest is made (346.63(1)(a)).
  4. If alcohol does not appear to be a factor, or if alcohol level is low compared to level of impairment (PBT), officer will contact supervisor to request DRE. If the PBT registers greater than 0.12, the DRE will not be called unless extreme/extenuating circumstances exist. **(EX: traffic fatality)**
  5. Supervisor will determine if DRE will be called, using available information – if DRE is on- or off-duty/available to assist, length of DRE response time, signs of other drug use, or other information from officer on scene. **Comment:** Supervisor may request a DRE to respond and assist other law enforcement agencies if mutual aid is requested. Dispatch will contact the appropriate DRE.
  6. If the DRE is able to respond he/she will coordinate with the supervisor where to meet with the officer. **Comment:** Drug evaluations are normally not performed at roadside, but in a controlled environment such as hospital facilities or Intoximeter/pre-booking room.
  7. Drug Evaluation and Classification: DEC is a highly technical function performed by the DRE. Persons performing the evaluation and classification must possess the proper certification and credentials.
  8. The arresting/contact officer will provide the DRE with the results of field sobriety testing, the PBT result if administered, and any other observations or evidence collected which would indicate impairment.
  9. The primary OWI test must be blood or urine if the DEC process is to be used. The DRE can still respond if there is a refusal.
  10. The arresting officer must stay with the suspect during the DEC. Once the DRE is finished, the suspect will be returned to the arresting officer.
  11. Drug evaluations will be conducted by a minimum of two (2) officers **if possible**; at least one of who will be a certified DRE. The DRE may direct an officer to record information related to the drug evaluation checklist.
  12. Persons arrested will be read the Miranda Warning before a DEC procedure is implemented.
  13. The DRE will prepare a supplemental report concerning the Drug Evaluation and Classification procedure.
  14. The arrest/contact officer will continue to process the suspect. If a Prohibited Alcohol Concentration (PAC) is not indicated, the officer should consider a citation for 346.63(1)(am) Operating Motor Vehicle with a detectable amount of a Restricted Controlled Substance.