

**VEHICULAR ASSAULT IN THE SECOND DEGREE
(Snowmobile)
Penal Law § 120.03(3)
(Committed or after on or after Nov. 1, 2007)**

The (*specify*) count is Vehicular Assault in the Second Degree.

Under our law, a person is guilty of Vehicular Assault in the Second Degree when he or she operates a snowmobile¹ upon a street, highway, public trails, lands, bodies of water, or private property of another²

Select appropriate alternative(s):

while he or she has .08 of one per centum or more by weight of alcohol in his or her blood as determined by a chemical test of his or her blood, breath, urine or saliva;³

[or] while he or she is in an intoxicated condition;⁴

[or] while his or her ability to operate such snowmobile is impaired by the use of a drug;⁵

and as a result of such intoxication [or impairment by the use of

¹ At this point, the statute continues: "in violation of paragraph (b), (c) or (d) of subdivision one of section 25.24 of the parks, recreation and historic preservation law." This charge separately defines the term "snowmobile" and substitutes the operative language of the Parks, Recreation and Historic Preservation Law [PRHPL] 25.24(1)(b),(c),(d). The court should select the appropriate subdivision(s) to charge.

² The elements "upon a street, highway, public trails, lands, bodies of water, or private property of another" are a predicate to each of the applicable paragraphs of PRHPL 25.24 (1). If there is an issue concerning "highway," a definition of that term is set forth in PRHPL 21.05(9).

³ PRHPL 25.24 (1)(b). At this point, the statute continues: "made pursuant to the provisions of subdivision six of this section."

⁴ PRHPL 25.24 (1)(c).

⁵ PRHPL 25.24 (1)(d).

a drug or by the combined influence of drugs or of alcohol and any drug or drugs], operates such snowmobile in a manner that causes serious physical injury to another person.⁶

The following terms used in that definition have a special meaning:

[OPERATE means to ride in or on, other than as a passenger, or use or control the operation of a snowmobile in any manner [whether or not said snowmobile is under way].⁷]

SNOWMOBILE means a self-propelled vehicle equipped with a motor, originally manufactured and designed for travel on snow or ice, steered by skis or runners and supported in whole or in part by one or more skis, belts or tracked cleats.⁸

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of death, or which causes death, or serious and protracted disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁹

[The term DRUG includes *(specify)*.¹⁰]

[Note: If a count for “operating a snowmobile while under the

⁶ The text of the statute contains two references to causing “serious physical injury. In order to avoid redundancy and for clarity, the pattern charge contains one reference to such term. As necessary and appropriate, there is an instruction on the meaning of “causation” in the Additional Charge section of this article.

⁷ If in issue, this statutory definition of “operate” in PRHPL 21.05(5) may be given. In the context of the crime defined by this instruction, however, the snowmobile will normally be “under way.”

⁸ PRHPL 21.05(3).

⁹ Penal Law § 10.00(10).

¹⁰ Pursuant to PRHPL 21.05(4) the term "drug" has the meaning set forth in Vehicle & Traffic Law § 114-a, which states: “The ‘term’ drug . . . means and includes any substance listed in section thirty-three hundred six of the public health law.”

influence of alcohol or drugs pursuant to PRHPL 25.24 (b), (c), or (d) has been charged, incorporate the applicable portions of that charge here by reference. If not, select the following appropriate alternative(s) to charge:

If the defendant is charged with .08 of one per centum or more by weight of alcohol in his or her blood, add the following as necessary and appropriate:

To determine whether the defendant had .08 of one per centum or more by weight of alcohol in his/her blood, you may consider the results of any test given to determine the alcohol content of defendant's blood.

[NOTE: Add if applicable:

In this case, the device used to measure blood alcohol content was (specify). That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.^{11]}

A finding that the defendant operated a motor vehicle, and that thereafter the defendant had .08 of one per centum or more by weight of alcohol in his/her blood permits, but does not require, the inference that, at the time of the operation of the motor vehicle, the defendant had .08 of one per centum or more by weight of alcohol in his/her blood.¹² In deciding whether to draw that inference you may consider

¹¹ This paragraph may be used only when the device employed is included on the Department of Health schedule (see 10 NYCRR § 59.4 [b]) of those devices satisfying its criteria for reliability (see 10 NYCRR § 59.4 [a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (see *People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

¹² See *People v Mertz*, 68 NY2d 136 (1986). In *Mertz*, the test was taken within two hours of defendant's arrest. In *People v McGrath*, 73 NY2d 826 (1988), the Court held that chemical tests performed pursuant to a court order issued in compliance with Vehicle and Traffic Law § 1194-a are not subject to the two-hour limitation. The time for administering a court-ordered chemical test is limited only by considerations of due process.

the results of any test given to determine the alcohol content of defendant's blood.

In considering the accuracy of the results of any test given to determine the alcohol content of defendant's blood you must consider:

- * the qualifications and reliability of the person who gave the test;
- * the lapse of time between the operation of the motor vehicle and the giving of the test;
- * whether the device used was in good working order at the time the test was administered; and
- * whether the test was properly given.¹³

[NOTE: Add if applicable: Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.¹⁴]

It is not a requirement of operating a snowmobile while one has .08 of one per centum or more by weight of alcohol in his or her blood that the person's driving was actually affected by alcohol consumption or that he or she exhibited characteristics usually associated with intoxication.

Nevertheless, in evaluating the evidence offered to prove that the defendant did operate a motor vehicle while having a blood alcohol content of .08 of one per centum or more, you may consider, in addition to evidence of the results of the chemical test and the circumstances under which it was administered, any evidence that, at times relevant to this charge, the defendant exhibited, or did not exhibit, signs of

¹³ See *People v Freeland*, 68 NY2d 699 (1986).

¹⁴ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

alcohol consumption.¹⁵ Thus you may consider evidence of:

- * the defendant's physical condition and appearance, balance and coordination, and manner of speech;
- * the presence or absence of an odor of alcohol;
- * the manner in which the defendant operated the motor vehicle;
- * [opinion testimony regarding the defendant's sobriety;]
- * [the circumstances surrounding any accident].

[NOTE: [Note: If the defendant is charged with operating a snowmobile while intoxicated, add the following as necessary and appropriate:

A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is incapable, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver.¹⁶

The law does not require any particular chemical or physical test to prove that a person was in an intoxicated condition. To determine whether the defendant was intoxicated you may consider all the surrounding facts and circumstances, including, for example:

- * the defendant's physical condition and appearance, balance and coordination, and manner of speech;
- * the presence or absence of an odor of alcohol;

¹⁵ See *People v Mertz*, 68 NY2d 136, 146 (1986).

¹⁶ See *People v Ardila*, 85 NY2d 846 (1995); *People v Cruz*, 48 NY2d 419, 428 (1979).

- * the manner in which the defendant operated the motor vehicle;
- * [opinion testimony regarding the defendant's sobriety];
- * [the circumstances of any accident];
- * [the results of any test of the content of alcohol in the defendant's blood].

*[NOTE: If there is evidence of blood-alcohol content, add as applicable]*¹⁷

In this case, the device used to measure blood alcohol content was (specify). That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.]

[NOTE: Add as applicable:

Evidence that there was .07 of one per centum or more but less than .08 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence that such person was not in an intoxicated condition.]¹⁸

In considering the accuracy of the results of any test given to determine the alcohol content of defendant's blood you must consider:

- * the qualifications and reliability of the person who gave the test;
- * the lapse of time between the operation of the motor vehicle and the giving of the test;

¹⁷ This paragraph may be used only when the device employed is included on the Department of Health schedule (see 10 NYCRR § 59.4 [b]) of those devices satisfying its criteria for reliability (see 10 NYCRR § 59.4 [a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (see *People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

¹⁸ PRHPL 25.24(3).

* whether the device used was in good working order at the time the test was administered; and

* whether the test was properly given.¹⁹

[NOTE: Add as applicable:

Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.]²⁰

[NOTE: If the defendant is charged with operating a snowmobile while impaired by a drug, add the following as necessary and appropriate:

A person's ability to operate a motor vehicle is IMPAIRED by the use of a drug when that person's use of a drug has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.²¹

The law does not require any particular chemical or physical test to prove that a person's ability to operate a motor vehicle was impaired by the use of a drug. To determine whether the defendant's ability to operate a motor vehicle was impaired, you may consider all the surrounding facts and circumstances, including, for example:

* the defendant's physical condition and appearance, balance and coordination, and manner of speech;

¹⁹ *People v Freeland*, 68 NY2d 699 (1986).

²⁰ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

²¹ Cf. *People v. Cruz*, 48 NY2d 419, 427 (1979) (defining impairment by alcohol).

- * the presence or absence of an odor of a drug;
- * the manner in which the defendant operated the motor vehicle;
- * [opinion testimony regarding the defendant's being under the influence of a drug];
- * [the circumstances of any accident];
- * [the results of any test for the presence of drugs in the defendant's blood].

[NOTE: If there is evidence of drugs in the defendant's blood, add, as appropriate, the following paragraphs:

In considering the results of any test given to determine the content of the defendant's blood you must consider:

- * the qualifications and reliability of the person who gave the test;
- * the lapse of time between the operation of the motor vehicle and the giving of the test;
- * whether the device used was in good working order at the time the test was administered; and
- * whether the test was properly given.²²

[Note: Add as applicable: Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.)²³

²² *People v. Freeland*, 68 NY2d 699 (1986).

²³ See *People v. Freeland*, 68 NY2d 699, 701 (1986); *People v. Mertz*, 68 NY2d 136, 148 (1986).

[NOTE: If there was an improper refusal to submit to a test, add:

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of [alcohol / a drug] in violation of law.^{24]}

Under our law, if the People prove beyond a reasonable doubt that the defendant was operating a snowmobile while unlawfully intoxicated [or impaired by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs^{25]} and while doing so caused serious physical injury to another person, then you may, but are not required to, infer that, as a result of such intoxication [or impairment by the use of alcohol or a drug or by the combined influence of drugs or of alcohol and any drug or drugs], the defendant operated the snowmobile in a manner that caused such serious physical injury.²⁶

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case,

²⁴ PRHPL 25.24(f); Vehicle and Traffic Law § 1194(f); *People v. Thomas*, 46 NY2d 100 (1978), *appeal dismissed for want of a substantial federal question*, 444 US 891 (1979).

²⁵ This paragraph reproduces the "rebuttable presumption" (*i.e.*, a permissible inference) set forth in Penal Law § 120.03(last paragraph). The words here in brackets, "by the combined influence of drugs or of alcohol and any drug or drugs," while appearing in the definition of the crime, do not appear at this point in the presumption statute as a predicate to the permissible inference which follows. The permissible inference which follows, however, does recite those words.

²⁶ Penal Law § 120.03(last paragraph). The Legislative Memorandum in support of this statute states that "the addition of the rebuttable presumption provision would create a causal link between a driver who causes serious physical injury or death and a presumption that it was his or her intoxication or impairment that was the cause of such serious physical injury or death."

beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name), operated a snowmobile:

Select appropriate alternative(s):

while the defendant had .08 of one per centum or more by weight of alcohol in his/her blood as determined by a chemical analysis of his/her blood, breath, urine or saliva;

[or] while the defendant was in an intoxicated condition;

[or] while the defendant's ability to operate such vehicle was impaired by the use of a drug; and

2. That as a result of such intoxication [or impairment by the use of a drug], the defendant operated the snowmobile in a manner that caused serious physical injury to another person.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.