



# DIRECTIVES

## Oak Creek Police Department

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Title:

### OPERATING WHILE INTOXICATED ARRESTS

Directive Number:

7-500

Critical Policy

Yes  No

Open Record

Yes  No

Total Pages:

9

Applicability:

All Employees

### I. PURPOSE

The purpose of this policy is to establish guidelines for arresting individuals operating a vehicle while intoxicated. Intoxicated drivers are a major cause of death and injury on our roadways. When a subject is arrested for operating while intoxicated (OWI), there are legal procedures that must be followed to ensure a conviction.

### II. POLICY

The following will be the guidelines to be followed when a suspected OWI subject is arrested and decisions are to be made as to what test should be administered and when a subject should go before a District Attorney.

### III. PROCEDURE

#### A. First Offense

1. When a subject is arrested for OWI, if it is a first offense with no injury or death involved, the offense will be considered non-criminal and the matter will go to Municipal Court.
2. A breath sample will be requested as the “Primary Chemical Test” by utilizing the Intoximeter machine, unless circumstances warrant a change to an alternative test of blood or urine (consult the duty supervisor and see Section III(F)—*Intoximeter Cases*, for additional information.) Such circumstances include, but are not limited to, Operating under the Influence of Controlled Substance cases, subject is legitimately unable to provide breath samples due to a medical condition, subject was involved in a motor vehicle accident with injuries and was transported to a medical facility, etc.
  - a. The “Informing the Accused Form” must be read to the subject verbatim prior to any / each test being conducted. Officers must make a good faith effort that the subject understands the form if there is a language barrier.
  - b. If the subject is unconscious (per *Mitchell v. Wisconsin*, a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent) the exigent circumstances exception to the Fourth Amendment will allow for a warrantless search of the subject’s blood to prevent the imminent destruction of evidence. Officers should request hospital staff to perform the blood draw and advise that a search warrant will be requested.
  - c. Evidence of intoxication may also be obtained via an Oak Creek City Attorney or a Milwaukee County District Attorney’s subpoena for medical records of a driver if blood was drawn by hospital staff and tested during medical treatment. This evidence can also be obtained via a signed search warrant from a judge.

### III. PROCEDURE—Continued

- d. If the subject refuses the primary chemical test, see Section III(G)—*Refusal to Submit to a Chemical Test*, for further information.
  - e. If the subject complies with the Primary Test and wishes a secondary test, the officer must comply. The officer chooses the secondary test.
3. Complete the OWI paperwork: Notice of Intent to Suspend Form if PAC is .08 or greater, citations, and Alcohol Influence Report. The Notice of Intent to Suspend (NIS) Form will also be issued upon an officer receiving a blood draw lab report indicating a subject has a detectable amount of a Restricted Controlled Substance (RCS). The RCS citation along with the NIS Form will be completed at that time.
  4. Complete the booking process by taking the subject's photo, fingerprints, and Fast ID check, if necessary.
  5. The subject may be released and ordered in for Municipal Court after a "Statement of Responsibility" is signed by a sober adult. In the event a responsible party is unavailable, the subject must be held for 12 hours from the time of the offense or until a chemical test indicates a breath alcohol concentration of less than .04 (WI §345.24). In certain circumstances, a subject may be transported to the Milwaukee County Jail for holding regarding the 12-hour holding period. Contact the on-duty supervisor at the jail for approval prior to transport. §345.24 requirements must still be met for RCS and Non-RCS Drug OWI offenses as well as if a subject is transported to MHEC or a medical facility (police hold required).

#### B. Second Offense

1. A second OWI offense is a crime and should be handled as a criminal offense [WI §346.63(1)]. An OWI 2<sup>nd</sup> offense is considered as any 2<sup>nd</sup> OWI-related offense within a 10-year period of the 1<sup>st</sup> OWI arrest date. If the prior offense is outside the 10-year period, the current offense remains a 1<sup>st</sup> offense. The primary chemical test for an OWI 2<sup>nd</sup> is breath – intoximeter.
2. Procedurally, a second offense arrest shall be handled in the same manner as a municipal 1<sup>st</sup> offense with the exception that the case will be referred to the Milwaukee County District Attorney's office for charging. Out-of-custody OWI 2<sup>nd</sup> offense cases will be referred to Milw. Co. Traffic Court at 821 W. State St., Room #221, 1:30 p.m., on a future liaison date—typically within 30 days. In-custody cases should be referred to the Milwaukee Co. District Attorney's Office at 949 N. 9<sup>th</sup> St., Room 110, within 48 hours.
3. If the subject refuses a chemical test, see Section III(G)—*Refusal to Submit to a Chemical Test*, for further information.
4. The subject may be released and ordered into Milwaukee Co. Traffic Court after a "Statement of Responsibility" is signed by a sober adult. If, for some reason, a responsible adult cannot be found, the subject will then be transported to Milwaukee Co. Jail so he/she will appear before the District Attorney's Office. The subject can post bail at the Milwaukee Co. Jail and be released. Officers must indicate on the ADR that the subject must appear at the DA's Office if bail is posted. The OWI 2<sup>nd</sup> offense charges must be reviewed within 48 hours if the subject is transported and held at the Milwaukee County Jail.

### III. PROCEDURE—Continued

#### C. Third or Subsequent Offenses

1. An OWI 3<sup>rd</sup> offense is considered a 3<sup>rd</sup> OWI offense when the subject has 2 prior OWI-related convictions after 01/01/89.
2. An OWI 3<sup>rd</sup> or Subsequent Offense will be handled similar to an OWI 2<sup>nd</sup> offense.
3. The “Primary Chemical Test” for a 3<sup>rd</sup> and subsequent offense will be a blood test. Blood tests are administered at local medical facilities by authorized medical staff. See Section III(D)—*When Blood is the Primary Chemical Test*, for additional information. Upon completion, the subject will be transported to the Oak Creek Police Department and the subject will be asked to submit to a secondary test—a breath sample utilizing the Intoximeter machine after a 20-minute observation period is conducted. These results will be utilized at the charging conference.
  - a. If the subject refuses any chemical test, see Section III (G)—*Refusal to Submit to a Chemical Test*, for further information.
4. Complete the OWI-related paperwork.
5. OWI 3<sup>rd</sup> and subsequent offenses, only take a booking photo. Do not fingerprint the subject. The Milwaukee Co. Jail will print the subject and submit the disposition sheets to the state.
6. Upon completion of the booking process, the subject must be transported to the Milwaukee County Jail for holding. The subject will be able to post bail at the jail for misdemeanor offenses. The charges must be reviewed within 48 hours. OWI 4<sup>th</sup> and subsequent are Felony offenses – no bail.

#### D. When Blood is the Primary Chemical Test

1. The subject will be transported to a local medical facility and the blood draw will be conducted by authorized medical personnel. Currently, Ascension Southeast Wisconsin Hospital, 10101 S 27<sup>th</sup> St., Franklin, is our primary medical facility to handle blood draws.
2. The “*Informing the Accused Form*” will be read to the subject verbatim prior to the blood draw. If the subject will comply, indicate so on the form. If the subject refuses, see Section III (G)—*Refusal to Submit to a Chemical Test*, for further information.
3. An authorized, State Blood Kit will be utilized and provided to the medical staff drawing the blood sample.
4. The officer will complete the form within the kit, which will be sealed back into the blood kit upon completion.
5. The officer must observe the blood being drawn and the samples sealed into the blood kit.
6. The following information should be documented: Name, DOB, address, phone number, and title of the medical staff conducting the blood draw as well as the time used by the medical staff that the blood draw was conducted.

### III. PROCEDURE—Continued

7. Our primary legal blood draw facility is Ascension Southeast Wisconsin Hospital. Ascension bills the individual directly when a legal blood draw is conducted. Inquire with registration to ensure this. If another medical facility is used, inquire as to the billing procedures. If OCPD will be billed for the legal blood draw, obtain a bill of service and attach it to your report for reimbursement during sentencing.

#### E. Chain of Custody

1. The blood vial/kit should be sealed as instructed, and the officer should maintain the chain of custody.
2. The blood kit should be mailed to the Wisconsin State Lab of Hygiene for analysis for OWI 1<sup>st</sup>-3<sup>rd</sup> offenses. Postage has to be purchased at the Post Office front counter during business hours or via the USPS Stamp kiosk inside the lobby after business hours using a supervisor issued credit card.
3. All OWI offenses constituting a Felony, as well as OWI Causing Injury offenses, the blood kit will be hand-delivered to the Wisconsin State Crime Laboratory-Milwaukee for analysis. All OWI offenses involving serious injury or death, consult the on-duty DA regarding the necessity to prepare and execute a blood draw search warrant.
4. When hand-delivering the blood kit, it will first be entered into the Oak Creek PD property system and placed into the temporary cabinet (evidence tape the seams) with an evidence submittal form. Email the Lt. of Detectives and Property Room Group with the code and the need for transport of the kit so that a Detective can be assigned to hand-deliver it to the WI State Crime Lab.

#### F. Intoximeter Cases

1. Document the observation times ensuring that your time matches the clock on the Intoximeter.
2. Ensure that you observe the subject during set up of the Intoximeter and throughout the test. Record the observation period in your report starting with the time the subject's mouth was checked till the first breath sample was submitted (must be 20 minutes or more).
3. Ensure the subject does not smoke, vomit, regurgitate or consume anything during the observation period. If this occurs, request the subject rinse their mouth thoroughly with water and document a new 20-minute observation period. If problems persist, consult the duty supervisor and consider changing the Primary Chemical Test.
4. Intoximeter testing – notify dispatch prior to turning off your portable radio that you are entering the intoximeter room. Escort the subject into the intoximeter room, have them sit on the stool, and secure them with the handcuff. Patrol radios and cell phones should be off while utilizing the intoximeter machine. The subject should remain handcuffed and seated while conducting the intoximeter testing.

#### G. Refusal to Submit to a Chemical Test

1. In arrests where the subject refuses to submit to the primary chemical test, it should be marked as a refusal. Document all statements, actions, and / or indications that the subject is refusing to comply with the requested chemical test. Arrests resulting in a refusal may be heard in a hearing if so requested by the subject.

### III. PROCEDURE—Continued

2. If the subject consents to the primary chemical test, but refuses a secondary chemical test, you cannot issue a refusal. The fact that the subject consented to the primary chemical test shall be enough to satisfy implied consent.
3. Municipal refusal hearings will be heard at the Municipal Court at the initial court date. Complete the Refusal Packet and submit electronically following the instructions for electronic referral. Consult with the duty supervisor to complete an OWI Blood Draw Search Warrant. The duty supervisor will assess the necessity for a forced blood draw in non-criminal matters.
4. For all State OWI offenses, if a subject refuses the Primary Chemical Test pursuant to a lawful arrest, a forced blood draw will be conducted once a valid Search Warrant has been granted (*Missouri v. McNeely*). (See OWI Manual or Search Warrant folder on the shared drive.) If a signed blood draw search warrant is obtained and the subject physically refuses to give blood, a reasonable amount of force may be used to stabilize the subject in order to obtain the blood samples. If hospital staff refuses to comply with the forced blood draw, obtain the staff's name(s) and other information for a D.A.'s order-in for obstructing. DO NOT arrest the staff at this time. Then call the duty D.A.
5. Upon completion of the forced blood draw, transport the subject to the Oak Creek Police Department and complete the refusal paperwork and booking process.
6. For State Criminal OWI offenses, refusal hearings will be heard at the circuit court level in 25 days or the next weekday beyond 25 days from the date of offense. Complete the "Notice of Intent to Revoke Form", including page 2 of that form. Complete the 25 day 'page 2' hearing form from the booking room cabinet.
  - Deliver within 2 business day to the Milwaukee County Clerk of Courts Office at 821 W. State Street Room 117: original Notice of Intent to Revoke form, 25-day hearing page 2, the signed by the judge original search warrant face sheet along with original affidavit, the search warrant return form. Maintain a copy of each item for department records.
7. The Notice of Intent to Suspend paperwork will not be completed for OWI Refusal cases.
8. Instructions for Submitting Notice of Intent to Revoke Form Electronically:
  - Send electronic copy of "Notice of Intent to Revoke" form (page 1) to [chemtest@dot.wi.gov](mailto:chemtest@dot.wi.gov)  
(Note - Do not send any other forms, reports, or paperwork)
  - Must be received within 5 days from notice date

### H. District Attorney Charging Information

1. State misdemeanor offenses out of custody should be ordered in around 30 days after the date of arrest.

State misdemeanor offenses in custody must be reviewed within 48 hours after time of arrest.

- OWI 1<sup>st</sup> Causing Misdemeanor Injury (§939.22(4)) – order in
- OWI 1<sup>st</sup> with a Passenger under the age of 16 – order in

### III. PROCEDURE—Continued

- OWI 2<sup>nd</sup> – order in
  - OWI 2<sup>nd</sup> with a Passenger under the age of 16 (Enhancer) – order in
  - OWI 3<sup>rd</sup> - transport to Milwaukee County Jail
2. State felony offenses (in custody – no bail) have to be reviewed within 72 hours after arrest. An additional 2 days are granted if probable cause is determined by means of the CR215 information reviewed by a court commissioner during intake court (total of 5 days).
- OWI 2<sup>nd</sup> or higher Causing Injury – transport to Milwaukee County Jail
  - OWI 3<sup>rd</sup> or higher with a Passenger under the age of 16 – transport to Milwaukee County Jail
  - OWI 4<sup>th</sup> or higher – transport to Milwaukee County Jail
3. OWI incidents involving serious injury or death, should go before a D.A. the next day.
- Injury by Intoxicated Use of a Vehicle- G.B.H. (§939.22(14))
  - Homicide by Intoxicated Use of a Vehicle
4. WI §343.307(1) and (2) addresses counting prior OWI-related convictions. For any out-of-state OWI convictions, the officer must submit a request for a certified copy of OWI conviction(s) from that state to add to the case review.

#### I. Ignition Interlock Devices (IID's)

1. IID Violations §347.413(1) – *Fail to install or tamper with IID* . Violators will be issued a state traffic citation and charges reviewed by the Milwaukee Co. District Attorney's Office. Consider issuing the subject for OAR or DL restriction violation (§343.43[1][d]) for operating in violation of IID orders are valid for 1 year after the date of reinstatement. Check the date issued and the language of order on CCAP.
2. IID's are issued for all OWI convictions involving refusals, OWI 1<sup>st</sup> offenses with a PAC of .15 or higher, and all state OWI offenses.
3. IID restriction limits a subject to a .02 PAC (§340.01[46m]). If a subject with an IID fails to provide a sample while driving or the sample is above a .02 limit, the vehicle's horn and emergency lights will be activated by the IID.

#### J. OWI Stops and Reports

1. Document and articulate the "Reasonable Suspicion" or "Probable Cause" you had to stop the subject. Attempt to record the violations/evidence via the In-Car Video and Body Worn Camera Systems.
2. Drivers are required to exit a vehicle upon request of an officer. *State v Frederick S. Smith* allows for an officer to have a face to face contact with a driver. The driver must lower the window or exit the vehicle upon request. *Pennsylvania v Mimms* allows for officers to request a subject to exit a vehicle for officer safety reasons. *State v Betow* requires that an officer have Reasonable Suspicion of possible OWI in order to request a driver to conduct field sobriety tests.
3. Document and articulate the "Probable Cause" you had to make the arrest. Attempt to record the observations and Standard Field Sobriety Test's via the In-Car Video and/or Body Worn Camera System.

III. PROCEDURE—Continued

4. Document and fully describe the subject's performance of the "Standard Field Sobriety Tests". If the subject refuses to cooperate or you choose not to give a test, or choose an alternative field test, document the reason and fully record your observations of the subject's actions throughout the processing period. Refusal to perform Standard Field Sobriety Tests is considered a conscious sign of guilt and can be used, in part, as Probable Cause for arrest.
5. The use of a Preliminary Breath Test (PBT) is encouraged only after the other SFST's have been conducted. The PBT should be utilized in circumstances when the subject is believed to be impaired due to drug usage and probable cause exists or if SFST's are not available due to the subject's condition (PI accident or prior injury). (Jefferson V. Renz advises that an officer needs "some" probable cause based on SFST's to ask a subject to submit to a PBT, not just odor. State V. Goss advises that in cases where the PAC requirement is lower, .02 [4<sup>th</sup> offense OWI or IID Violations], odor alone will be sufficient. The use of PBT's will also assist the DA's in charging cases that are awaiting blood results.)
6. An officer can move the SFST's to another location based on certain circumstances (i.e., weather). The driver must be informed of the reason for the change and advised that he or she is not under arrest (State V. Quartana). Officers may only transport to a new location within close vicinity of the original contact location. Court Rulings have defined "close vicinity" as being no more than "3-4" miles away.
7. Officer must complete the "Alcohol Influence Report" to include the Miranda warnings. The Officer should then interview the subject and record statements about prior OWI convictions within the state and out-of-state.
8. An officer should complete the "Notice of Intent to Suspend" paperwork and complete the Administrative Suspension packet if applicable (.02 restriction, .08+, RCS violations). The packet must be submitted to the state electronically within 5 days from the notice date.
  - Administrative Suspension Packet includes copies of the following: Informing the Accused Form, Intoximeter Report or Blood Lab Report, all citations, Notice of Intent to Suspend Form, and police narrative (citation narrative). The OWI/PAC citation should describe the reason for the stop and the probable cause for the arrest – observations of the driver, SFST clues, the 20-minute observation period/time frame, mouth check, the results, and any other evidence.
    - a. If you are awaiting blood results, do not submit a suspension packet prior to receiving blood results.
    - b. Once you receive the blood results submit the suspension packet electronically to the state with the blood results and **mail the driver their copy**. (Note: This could be months after the initial arrest.) We should not issue to the driver until it is mailed to the state. If appropriate, at this time we would also mail the driver his/her PAC or RCS ticket. We do not issue "Notice of Intent to Suspend" on Non-RCS drug OWI offenses.
    - c. If you have breath results, submit them immediately with the "Notice of Intent to Suspend", and issue the driver their copy at this time.
    - d. Non-felony OWI case files should be brought down to the D.A.'s Office within 30 days—even without blood results. Without results, it may get pended, but they will be aware of the pending case if another OWI for the same subject is received by the D.A.'s Office. Felonies should be immediately taken down.

### III. PROCEDURE—Continued

9. Restricted Controlled Substance OWI violations (RCS) §346.63(1)(am): These include Methamphetamine, Cocaine, THC and Heroin/Morphine. These cases only require that a detectable amount of an RCS drug be believed to be present within the driver's blood. The Milwaukee County DA's Office would like an OWI §346.63(1)(a) charge issued first when RCS cases are involved. The RCS §346.63(1)(am) charge should only be issued up receipt of a blood lab report confirming the presence of a detectable substance. Probable cause involved in these types of case to support an OWI offense – poor driving, physical indicators, and “some” indicators may be present during field sobriety tests. Evidence of OWI RCS are: physical indicators, observations of drugs / drug paraphernalia, evidence of drug consumption, and admittance of consumption within a time frame during / prior to driving. After an arrest is made, a Drug Recognition Expert (DRE) can be requested to attempt an evaluation of the driver at the hospital, consult the duty supervisor. The evaluation can be useful during court proceedings. .
10. Non-Restricted Controlled Substance OWI violations / non-alcohol: These types of OWI cases which typically involve medications, the officer investigating must have probable cause showing “impairment” in order to arrest. Probable cause may be obtained by observations of poor driving, physical indicators, field sobriety tests, and driver statements of consumption. If probable cause to arrest exists, an OWI §346.63(1)(a) charge will be sought. Blood will be the primary test. Upon receipt of the blood lab report, forward the information to the prosecutor. No further issuances will be required if a non-RCS is present. Do not issue the Notice of Intent to Suspend if non-RCS.
11. OWI Causing Injury offenses, document injuries, take photos, if possible, and obtain a signed medical release form. The District Attorney's office will request all medical records.

#### K. Hit and Run Cases

1. Ensure that you have a witness who can place the subject behind the wheel of the vehicle and operating it. Document this fully.
2. Or, Officers must observe the subject driving;  
  
Or, the subject must admit to driving;  
  
Or, Officer must be able to prove via physical evidence (blood, air bag dust, foot prints in snow or mud, or video footage), that the subject was driving.

#### L. Cell Phone Calls

1. Get the witness's full information.
2. Get a full description of the vehicle involved and description, if available, of its driver.
3. Document how the observed vehicle was operating.
4. If possible, an officer should still make their own observations of the subject vehicle before making the stop, keeping safety in mind.
5. Obtain 911 call recordings for prosecution of all OWI cases.

### III. PROCEDURE—Continued

#### M. Documentation

1. Cases going down to the D.A.'s office must have an e-referral review completed for charging.
2. A fully documented incident report is needed.
3. When a citation is written, a small but detailed narrative is needed in the narrative section of the citation. The OWI citation narrative should include the following if applicable: the reason for the contact - all driving violations, observations of the driver, and additional observations of impairment from field sobriety tests. The PAC citation narrative if applicable should include: the initiation time of the observation period, observation period verifications, the first breath sample time of the intoximeter machine (should be 20+min lapse), and the intoximeter results.

### IV. DISCLAIMER

The Operating While Intoxicated Arrests Policy developed by the Oak Creek Police Department is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of the Operating While Intoxicated Arrests Policy can only be the basis of a complaint by this Department, and then only in a non-judicial administrative setting.

#### REFERENCE:

Arrest Procedures Police #7-100  
Use of Force Policy #6-100  
Municipal Lockup Facility #11-100  
Wisconsin State Statute §340.01  
Wisconsin State Statute §343.307  
Wisconsin State Statute §345.24  
Wisconsin State Statute §346.63  
Wisconsin State Statute §347.413



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David R. Stecker  
Chief of Police

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