

## **DRIVING WHILE ABILITY IMPAIRED BY DRUGS**

### **Vehicle and Traffic Law 1192(4)**

#### **EXPLANATORY NOTE ON DEFINITION OF IMPAIRMENT**

In a prosecution for vehicular homicide, the basic crime, vehicular manslaughter in the second degree, Penal Law § 125.12(1), is committed in pertinent part when a person “operates a motor vehicle in violation of subdivision two, three, four or four-a of section eleven hundred ninety-two of the vehicle and traffic law . . . and as a result of such intoxication or impairment by the use of a drug or by the combined influence of drugs or of alcohol and any drug or drugs, operates such motor vehicle . . . in a manner that causes the death of such other person. The language “such . . . impairment by the use of a drug” refers back to VTL 1192(4) and (4-a), which define the misdemeanors of driving while “impaired by the use of a drug” (subd 4) or by the combined use of drugs and alcohol (subd 4-a).

In *People v. Cruz*, 48 N.Y.2d 419, 428 (1979), a prosecution for driving while intoxicated, the Court of Appeals held that “intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.” *Cruz* reasoned that because driving while intoxicated (a misdemeanor), was a more serious offense than driving while impaired by alcohol (a violation), the degree of impairment for intoxication by alcohol must be greater than that for the violation of driving while impaired by alcohol.

In *People v. Caden N.*, 189 A.D.3d 84, 90-91 (3d Dept 2020), *lv. to appeal denied*, 36 N.Y.3d 1050 (2021), a prosecution for vehicular manslaughter that alleged that the defendant’s ability to operate a vehicle had been impaired by the use of drugs, the court applied *Cruz*’s definition of “intoxication” in similarly holding that “impairment” by a drug requires that the motorist be “incapable of employing the physical and mental abilities which he [or she was] expected to possess in order

to operate a vehicle as a reasonable and prudent driver.” *Caden N.* reasoned that because driving while intoxicated by alcohol and driving while impaired by drugs (or a combination of drugs and alcohol) were both misdemeanors, making both the basis of a prosecution for vehicular manslaughter “can only be deemed consistent with the legislative scheme if the same standard is applied to each misdemeanor category included in the vehicular manslaughter statute.” 189 A.D.3d at 90. In so holding, the Third Department overruled *People v. Rossi*, 163 A.D.2d 660, 662 (3d Dept. 1990), “[t]o the extent that [it] can be read as holding that a conviction of vehicular manslaughter in second degree based upon a violation of Vehicle and Traffic Law § 1192(4) only requires proof that the motorist was impaired ‘to any extent’.” *Id.* at 91.

*Caden N.* did not explicitly discuss whether the standard for impairment for purposes of a prosecution for manslaughter in the second degree was also the standard to be applied in a prosecution for only VTL 1192(4), nor did *Caden N.* suggest that its definition of “impairment” for purposes of vehicle manslaughter was, notwithstanding the statutory language of “such...impairment by the use of a drug,” different than that for the same term in a prosecution of VTL 1192(4). *Caden N.* simply applied in the vehicular manslaughter case before it, the *Cruz* rationale, that the misdemeanors of driving while intoxicated and driving while impaired by the use of drugs should have the same standard of what constitutes impairment.

For these reasons, until an appellate court decides otherwise, CJI2d has employed *Caden N.*’s definition of “impaired” in the instructions for vehicular manslaughter and the parallel, vehicular assault charges, and in those for the misdemeanor impairment by a drug or combination of drug and alcohol offenses in VTL 1192(4), (4-a) and (2-a)(b). We recognize, however, that a trial court is not bound to follow the CJI2d instruction and may instead decide to apply *Caden N.*’s definition of impairment for a vehicular manslaughter or assault charge and the impaired “to any extent” definition for a VTL driving while impaired by the use of a drug or combination of alcohol and drugs charge, as set forth in the footnote to the definition of impaired.

## DRIVING WHILE ABILITY IMPAIRED BY DRUGS<sup>1</sup>

### Vehicle and Traffic Law 1192(4) (Committed on or after Nov. 1, 1988) (Revised Jan. 2008 & Dec. 2021)<sup>2</sup>

The (specify) count is Driving While Ability Impaired by Drugs.

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<sup>1</sup> This crime is classified a misdemeanor unless:

[1] If the defendant has within the previous ten years been convicted of a violation of Vehicle and Traffic Law § 1192(2), (3), or (4), or of Penal Law §§ 120.03, 120.04, 125.12, or 125.13, a conviction of driving while ability impaired by drugs is a class E felony. Vehicle and Traffic Law § 1193(1)(c)(i).

[2] If the defendant has within the previous ten years twice been convicted of any of those crimes, a conviction of driving while ability impaired by drugs is a class D felony. Vehicle and Traffic Law § 1193(1)(c)(ii). For the gradation of the offense for “special vehicles” see Vehicle and Traffic Law § 1193(1)(d).

Thus, an additional element of this crime when charged as a Class D or E felony is that the defendant has previously been convicted of one or more particular crimes. That element must be charged in a special information, and after commencement of trial the defendant must be arraigned on that special information. If, upon such arraignment, the defendant admits the element, the court must not make any reference to it in the definition of the offense or in listing the elements of the offense. But if the defendant denies the element or remains mute, the court must add the element to the definition of the offense and the list of elements. CPL § 200.60. See *People v. Cooper*, 78 N.Y.2d 476 (1991).

<sup>2</sup> The January 2008 revision was for the purpose of providing a clearer definition of “operates” by removing the language “for the purpose of placing it in operation” and replacing such language with “for the purpose of placing the vehicle in motion.” See *People v. Alamo*, 34 NY2d 453, 458 (1974); *People v. Marriott*, 37 AD2d 868 (3d Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist. Ct., Suffolk, 1994). See also *People v. Prescott*, 95 NY2d 655, 662 (2001).

The December 2021 revision was for the purpose of revising the definition of when a person’s ability to operate a motor vehicle is impaired by the use of a drug to accord with the holding of *People v. Caden N*, 189 A.D.3d 84 (3d Dept 2020). Cf. *People v. Cruz*, 48 NY2d 419, 428 (1979).

Under our law, no person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug.<sup>3</sup>

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

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular power.<sup>4</sup>

To OPERATE a motor vehicle means to drive it.

*[NOTE: Add the following if there is an issue as to operation:*

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.<sup>5]</sup>

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<sup>3</sup> In the statute, the word "drug" is followed by the words "as defined in this chapter." Since the charge later sets forth the definition of "drug," the words "as defined in this chapter" have been omitted.

<sup>4</sup> The term "motor vehicle" is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge. The term "public highway" appearing in the definition of "motor vehicle" is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of "motor vehicle" is restricted to a vehicle operated or driven on a "public highway," the provisions of Vehicle and Traffic Law § 1192 expressly apply to "public highways, private roads open to motor vehicle traffic and any other parking lot." Vehicle and Traffic Law § 1192(7). (The term "parking lot" is also specially defined by Vehicle and Traffic Law § 1192[7]. See also *People v. Williams*, 66 N.Y.2d 659 [1985].) The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

<sup>5</sup> See cases cited in note 2.

The word DRUG includes (*specify*).<sup>6</sup>

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 rendered that person incapable of employing the physical and mental abilities which that person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.<sup>7</sup>

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;

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:*

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<sup>6</sup> See Vehicle and Traffic Law § 114-a and Public Health Law § 3306(1).

<sup>7</sup> As indicated in footnote (1), this definition was revised in December 2021 to accord with the holding of *People v. Caden N*, 189 A.D.3d 84 (3d Dept 2020). The former definition read: "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."

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.<sup>8</sup>

(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.)<sup>9</sup>]

*[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 a drug in violation of law.<sup>10</sup>]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case beyond a reasonable doubt, both of the following two elements:

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<sup>8</sup> *People v. Freeland*, 68 N.Y.2d 699 (1986).

<sup>9</sup> *See People v. Freeland*, 68 N.Y.2d 699, 701 (1986); *People v. Mertz*, 68 N.Y.2d 136, 148 (1986).

<sup>10</sup> *See Vehicle and Traffic Law § 1194(f); People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dismissed for want of a substantial federal question, 444 U.S. 891 (1979).

1. That on or about (date), in the County of (county), the defendant, (defendant's name), operated a motor vehicle; and
2. That the defendant did so while his/her ability to operate the motor vehicle was impaired by the use of a drug.

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.