

Aggravated Unlicensed Operation

by

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What's it all about?

- **Aggravated Unlicensed Operation is operation of a motor vehicle when your privilege to do so has been withdrawn by the state.**

Three levels

- **AUO 3rd degree;**
- **AUO 2nd degree;**
- **AUO 1st degree.**
- **All share a common element, Aggravated Unlicensed Operation in the Third Degree.**

AUO in the 3rd Degree

Vehicle and Traffic Law §511(1)(a)

- **Aggravated Unlicensed Operation in the Third Degree.**
- **“such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle issued by the commissioner is suspended, revoked or otherwise withdrawn by the commissioner.**

Two points

- **Either the license has been suspended or revoked, OR;**
- **The privilege of obtaining the license has been suspended or revoked.**
- **Aggravated Unlicensed Operation in the Third Degree is an unclassified misdemeanor.**

Essentials

- **"knew or had reason to know."**
- **This is a *mens rea*.**
- **To be convicted, a defendant must know or have reason to know that his driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor Vehicles." *People v. Pacer*, 6 N.Y.3d 504, 508, 814 N.Y.S.2d 575, 576-77 (2006).**

Proving Knowledge

- In ***People v. Pacer***, 6 N.Y.3d 504, 508, 814 N.Y.S.2d 575, 576-77 (2006) the Court of Appeals determined that the use of a Vehicle and Traffic Law § 214 affidavit violated the Right of Confrontation as detailed in ***Crawford v. Washington***, 541 U.S. 36, 124 S.Ct. 1354 (2004).

Proving Knowledge

- **A certified driving abstract, while proof that the motorist's privilege was suspended or revoked (*see, People v. Smith*, 118 A.D.3d 920 [2d Dep't 2014]; *People v. Stewart*, 68 A.D.3d 1438 [3d Dep't 2009]; *People v. Carney*, 41 A.D.3d 1239 [4th Dep't 2007]) may not necessarily satisfy the requirement of *knowledge* of that fact.**

Proving Knowledge

- **Knowledge can be proven by calling a witness who actually mailed the notice, or;**
- **The Defendant's admission, or;**
- **Utilizing the transcript of the defendant's sentencing wherein he/she is advised by the court that he/she/is revoked or suspended, or;**
- **Utilizing the order of suspension and revocation with defendant's signature (*see, People v. Jarocho*, 66 A.D.3d 1384 (4th Dep't 2009)).**

“I moved and forgot to tell them ...”

- **Is no excuse.**
- **Vehicle and Traffic Law §505(5) requires “every licensee to notify the commissioner in writing of any change of residence of such licensee within [10] days after such change ...”**
- ***People v. Kirksey*, 186 Misc. 2d 514, 718 N.Y.S.2d 583 (Ithaca City Ct. 2000), failure to notify estopped the defendant from claiming lack of knowledge.**

“Did you know your license was suspended or revoked ...”

- **While the response to this question can satisfy the notice requirement, *it must be included in the CPL § 710.30 notice.***
- **A statement in an accusatory instrument will not satisfy this requirement. It is devoid of a notice *that the statement will be used at trial* (*People v. Calise*, 167 Misc. 2d 277 [N.Y. City Crim. Ct. 1996]).**

“But the time was up . . .”

- **MANY defendants assume that when the 90 days or six months has expired that their license is automatically restored.**
- **This is fatally incorrect.**
- **Vehicle and Traffic Law § 503(2)(j) makes it clear that a driver’s license suspension does not terminate until a suspension termination fee is paid.**
- **Vehicle and Traffic Law §§ 510(5), 510(6), 1193(2)(c)(1) 1194(2)(d)(1) make clear that an application for relicensure is required after a period of license revocation.**

Unlicensed Operation

- **Vehicle and Traffic Law § 509(1):**
- **Defendants who drive without a license but who neither know nor have reason to know that their driving privileges have been terminated.**
- **This is a traffic violation.**
- **It is a lesser included offense where it is supported by a reasonable view of the evidence (*People v. Pacer*, 6 N.Y.3d 504 [2006]).**

“Public Highway”

- **Vehicle and Traffic Law § 1100(a) provides that “[t]he provisions of [VTL Title VII] apply upon public highways, private roads open to public motor vehicle traffic and any other parking lot, except where a different place is specifically referred to in a given section.”**
- **BUT ...**

“Public Highway”

- **Vehicle and Traffic Law § 511 is part of Title V—*not Title VII.***
- **Additionally, Vehicle and Traffic Law § 511, by its express terms only applies to operation “upon a public highway.”**
- **Thus, it is possible, under the right circumstances, for a revoked operator to be guilty of Vehicle and Traffic Law § 1192 and not a § 511 offense.**

A Continuing Crime

- **Aggravated Unlicensed Operation is a continuing crime, “a continuing offense over a period of time.” *People v. Shack*, 86 N.Y.2d 529 [1995].**
- **Hence, the Defendant cannot be prosecuted in multiple jurisdictions for a single incident of Aggravated Unlicensed Operation.**

Attempted AUO?

- **While it is not a legally cognizable offense (*see, People v. Prescott*, 95 N.Y.2d 655, (2001) [attempted DWI not a cognizable offense], a defendant may plead guilty to a non-existent crime (*see, People v. Foster*, 19 N.Y.2d 150 (1967)).**

AUO 3rd Sentencing

- **A fine of between \$200 and \$500, up to 30 days in jail, or both;**
- **A mandatory surcharge of \$93 (Town or Village Court) or \$88 (all others);**
- **A crime victim assistance fee of \$5.**

AUO 3rd Sentencing

- **When a person is convicted of committing AUO 3rd in a vehicle with a GVWR of more than 18,000 pounds:**
 - **A fine of between \$500 and \$1,500, up to 30 days in jail, or both;**
 - **A crime victim assistance fee of \$5. VTL § 1809(1)(c); and**
 - **Mandatory surcharges of \$93 (Town or Village Court) or \$88 (all others).**

AUO 3rd Sentencing

- **The mandatory sentences previously set forth are not mandatory when the basis of the suspension is overdue child support or unpaid taxes. Vehicle and Traffic Law § 511(7).**
- **Successful completion of DDP will not terminate the imprisonment portion of the sentence of a sentence for AUO (*see*, Vehicle and Traffic Law § 1196(4)).**

AUO 3rd Sentencing

- **Attorney's can be suspended from practice upon an AUO 3rd conviction (*Matter of Semel-DeFeo*, 78 A.D.3d 82, 906 N.Y.S.2d 914 (2dDep't 2010)).**

“Mandatory” Fines

- **When a fine is not mandatory and the Court levies a “mandatory” fine, the conviction must be reversed (*People v. Olmstead*, 111 A.D.3d 1063 [2013]).**
- **A sentence for AUO 3rd is not required to include a fine (*see*, e.g., Vehicle and Traffic Law § 511(1)(b).**
- **A conviction imposing one is reversible. *People v. Kropp*, 49 A.D.3d 1339, 854 N.Y.S.2d 273 (4th Dep't 2008).**

AUO in the 2nd Degree

Vehicle and Traffic Law § 511(2)(a)

- **Requires:**
 - **Commission of AUO 3rd; and,**
 - **The motorist has previously been convicted of an offense which includes the elements of AUO 3rd within the immediately preceding [18] months; or**
 - **the suspension or revocation is based upon a refusal to submit, “underage DWI”, or any conviction for Vehicle and Traffic Law § 1192); or**
 - **the suspension was a mandatory suspension pending prosecution pursuant to [VTL § 1193(2)(e)]; or,**
 - **such person has in effect [3] or more suspensions, imposed on at least [3] separate dates, for failure to answer, appear or pay a fine.**

Knowledge of all three suspensions?

- **No. In *People v. Abelo*, 79 A.D.3d 668, 914 N.Y.S.2d 54 (2010), the defendant argued that the People had to prove knowledge of all three suspensions.**
- **The First department disagreed, "the statute only requires knowledge or reason to know of such suspension, not of three suspensions."**

AUO 2nd Sentence

- **A fine of not less than \$500, *and* either (a) up to 180 days in jail, (b) where appropriate, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation. VTL § 511(2)(b) and,**
- **In a Town or Village Court, the mandatory surcharge of \$93, in all others, \$88.**

AUO 2nd Sentence

- **A sentence for AUO 2nd must include a fine *and* either jail or probation. See, e.g., Vehicle and Traffic Law § 511(2)(b); *People v. Jimerson*, 13 A.D.3d 11407 (4th Dep't 2004).**

“Maximum fine”

- **No maximum fine is set forth in the statute.**
- **In *People v. Jimerson*, 13 A.D.3d 1140 (4th Dep't 2004), the court found the maximum fine for AUO 2nd to be is \$1,000 based upon Penal Law § 80.05(1) which provides that the maximum fine for most class A misdemeanors is \$1,000.**

Enhanced sentencing

- **The sentence of the Court must be:**
 - **A fine of between \$500 and \$1,000, *and either (a) between 7 and 180 days in jail, (b) where appropriate, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation;***
 - **if the case is in a Town or Village Court, the mandatory surcharge is \$93; otherwise, the mandatory surcharge is \$88.**

AUO in the 1st Degree

Vehicle and Traffic Law § 511(3)(a)

- **A motorist commits the offense of AUO 2nd and is operating a motor vehicle while under the influence of alcohol or a drug in violation of Vehicle and Traffic Law § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)]; or**
- **Commits AUO 3rd and is operating a motor vehicle while such person has in effect 10 or more suspensions, imposed on at least 10 separate dates for failure to answer appear or pay a fine; or**
- **Commits the offense of AUO 3rd as defined in Vehicle and Traffic Law § 511(1)]; and is operating a motor vehicle while under permanent revocation as set forth in Vehicle and Traffic Law § 1193(2)(b)(12)]; or**
- **Operates a motor vehicle while holding a alcohol conditional license while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)].**
- **AUO 1st is a class E felony.**

CPL § 200.60 applies to felony AVO

- **The People must not refer to the prior conviction in the indictment and utilize a special information at arraignment.**
- **Thereafter, the Defendant has the option to admit the allegation or permit the People to prove it at trial (*see, People v. Cooper*, 78 N.Y.2d 476, 478, 577 N.Y.S.2d 202, 203 (1991); *see also*, *See, e.g., People v. Burgess*, 89 A.D.3d 1100, 933 N.Y.S.2d 715 (2d Dep't 2011); *People v. Anderson*, 89 A.D.3d 1161, 932 N.Y.S.2d 561 (3d Dep't 2011); *People v. Flanagan*, 247 A.D.2d 899, 668 N.Y.S.2d 528 (4th Dep't 1998).**

Lesser Included Offenses

- **AUO 2nd is a lesser included offense of AUO 1st *People v. Sikorski*, 280 A.D.2d 414 (1st Dep't 2001).**

Must there be and 1192 conviction?

- **No. While a violation of Vehicle and Traffic Law § 1192 is an essential element of an AUO 1st charge, a *conviction* for Vehicle and Traffic Law § 1192 is not.**
- **In *People v. Keller*, 252 A.D.2d 817 (3d Dep't 1998) Defendant was convicted by a jury of AUO 1st.**
- **His concurrent DWAI conviction was reversed.**
- **On a subsequent appeal he argued that the DWAI reversal mandated reversal of the AUO 1st.**

Must there be and 1192 conviction?

- **“ Commits the offense of aggravated unlicensed operation of a motor vehicle in the second degree ... and is operating a motor vehicle while under the influence of alcohol or a drug in violation of subdivision one, two, two-a, three, four, four-a or five of section 1192”**
- **Note the use of the phrase “ in violation of ”.**

Must there be and 1192 conviction?

- **In *People v. Keller*, 252 A.D.2d 817 (3rd Dept., 1998) the conviction for DWAI was reversed.**
- **On further appeal the Defendant claimed that this was fatal to the AUO 1st.**
- **The Court disagreed. “ Since a conviction under [VTL] § 1192 is not an element of [AUO 1st] and all of the elements necessary to convict defendant of this charge were presented to the jury, we find that their verdict should not be disturbed.”**

Sentence for AUO 1st

- **A fine of between \$500 and \$5,000, *and either (a) up to 4 years in state prison, (b) where appropriate and a term of imprisonment is not required by the Penal Law, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation. VTL § 511(3)(b);***
- **surcharge of \$88.; and**
- **A crime victim assistance fee of \$5. VTL § 1809(1)(c).**

Sentence for AVO 1st

- **Sentence for AVO 1st must include fine and either jail or probation (*People v. Duquette*, 100 A.D.3d 1105, (3d Dep't 2012); *People v. Rodriguez*, 164 Misc. 2d 974.**
- **In *People v. Faulcon*, 109 A.D.3d 1021, (3d Dep't 2013) the court declared that a promise not to fine was an illegal sentence.**

Concurrent Sentencing?

- **Yes and no.**
- **Yes, when the non AVO offense contains an element not found in the AVO such as Reckless Endangerment (*People v. Goldstein*, 12 N.Y.3d 295 (2009));**
- **No, PL § 70.25(2) requires concurrent sentences where defendant convicted of AVO 1st and DWI/DWAI (*People v. Clemens*, 177 A.D.2d 1053 (4th Dep't 1991); *People v. Milo*, 235 A.D.2d 552 (2nd Dep't 1997)).**

Second Felony Offender Status?

- **No. Such requires that the Defendant be convicted under the Penal Law.**
- **However, *persistent* status may be available.**
- **Penal Law § 70.10(1)(a) defines a "persistent felony offender" as "a person other than a persistent violent felony offender ... who stands convicted of a felony after having previously been convicted of two or more felonies[.]"**

Persistent Felony Status

- ***People v. Bowers*, 201 AD2d 830 (3rd Dept. 1994) affirmed the use of Penal Law § 70.10(1)(a) for multiple DWI convictions.**

Operation under a Conditional License

- **Vehicle and Traffic Law 1196(7)(a) creates the DWI conditional license. However, the license or privilege is still technically suspended or revoked.**
- **VTL § 1196(7)(f), expressly provides that “It shall be a *traffic infraction* for the holder of a conditional license or privilege to operate a motor vehicle upon a public highway for any use other than those authorized pursuant to [VTL § 1196(7)(a)].”**

Operation under a Conditional License

- **HOWEVER, effective November 1, 2013, Vehicle and Traffic Law § 511(3)(a)(iv) provides that the motorist commits felony AUO 1st, if he or she operates under the influence of alcohol or a drug in violation of Vehicle and Traffic Law §§ 1192(1), (2), (2-a), (3), (4), (4-a) or (5) on a conditional license issued pursuant to Vehicle and Traffic Law § 1196(7)(a).**

“But my _____ license is good.”

- **Without mentioning names, some states will license *anybody*.**



“But my _____ license is good.”

- **Vehicle and Traffic Law § 511(4) provides that “In any prosecution under [VTL § 511] or [VTL § 511-a], it is a defense that the person operating the motor vehicle has at the time of the offense a license issued by a foreign country, state, territory or federal district, which license is valid for operation in this state in accordance with the provisions of [Vehicle and Traffic Law L § 250].”**

“But my _____ license is good.”

- **So far so good , BUT:**
- **Vehicle and Traffic Law § 250(2) provides, in pertinent part, that:**
- **“ The exemption granted in this subdivision shall not apply to persons whose privilege of operating a motor vehicle in this state, or whose former license to drive in this state, has been suspended or revoked, until such suspension or revocation has been terminated or privilege of operating a motor vehicle restored.”**

Plea bargaining limitations

- **Vehicle and Traffic Law § 511(5) provides:**
- **Where an accusatory instrument charges a violation of [VTL § 511], any plea of guilty entered in satisfaction of such charge must include at least a plea of guilty of one of the offenses defined by this section and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized.**

Plea bargaining limitations

- **“[I]f the district attorney upon reviewing the available evidence determines that the charge of a violation of this section is not warranted, he may set forth upon the record the basis for such determination and consent to a disposition by plea of guilty to another charge in satisfaction of such charge, and the court may accept such plea.”**

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