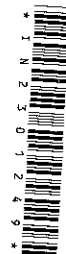


MTC, MQ, AD1



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE COUNTY COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 13-17503MM10A

JUDGE: GOTTLIEB

STATE OF FLORIDA

Plaintiff,

vs.

NADEEM ALI

Defendant.

RECEIVED
2015 MAY 29 PM 3:19
STATE ATTORNEY
17TH JUDICIAL CIRCUIT
RECEPTION

OFFICE OF THE STATE ATTORNEY
201 Southeast Sixth Street
Fort Lauderdale, Florida
April 28, 2015
2:36 P.M.

APPEARANCES:

MICHAEL J. SATZ, STATE ATTORNEY
BY: JUSTIN McCORMACK, ESQUIRE
ASSISTANT STATE ATTORNEY
APPEARING ON BEHALF OF THE PLAINTIFF

ROBERT D. MALOVE, P.A.
BY: ROBERT D. MALOVE, ESQUIRE
APPEARING ON BEHALF OF THE DEFENDANT

TELEPHONIC DEPOSITION
OF
MATTHEW MALHIOT

I-N-D-E-X

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

WITNESS

Matthew Malhiot

Direct Examination
by Mr. McCormack

Page 3

1 Deposition of MATTHEW MALHIOT, a witness of lawful
2 age, taken by the Plaintiff for the purpose of discovery and
3 for use as evidence in the above-entitled matter, wherein
4 STATE OF FLORIDA is the Plaintiff and NADEEM ALI is the
5 Defendant, pending in the County Court of the 17th Judicial
6 Circuit, in and for Broward County, Florida, Pursuant to
7 notice heretofore filed before Audrey J. Forrest Gentles, a
8 Court Reporter and Notary Public in and for the State of
9 Florida at Large, taken at the Office of the State Attorney,
10 201 Southeast Sixth Street, Fort Lauderdale, Florida, on the
11 28th day of April, 2015, commencing at 2:36 p.m.

12

13 THEREUPON:

14

MATTHEW MALHIOT

15 a witness of lawful age, being called as a witness by the
16 Plaintiff, having been first duly sworn, testified under
17 oath as follows:

18

19

DIRECT EXAMINATION

20 BY MR. McCORMACK:

21 Q. Okay. This is Justin McCormack on behalf of
22 the State.

23 A. I can hear you loud and clear.

24 MR. McCORMACK: Okay. And we have Robert
25 Malove on behalf of the Defense?

1 MR. MALOVE: I'm here.

2 THE WITNESS: I'm going to release the notary
3 so she can get back to her desk.

4 MR. McCORMACK: Sounds good.

5 BY MR. McCORMACK:

6 Q. Okay, Mr. Malhiot. Am I pronouncing it
7 correctly?

8 A. It's pronounced Myit, M-y-i-t, Malhiot.

9 Q. Malhiot. Okay. And do you go by Dr. Malhiot,
10 Mr. Malhiot?

11 A. Mr. I am not a doctor.

12 Q. Okay. Mr. Malhiot. All right, Mr. Malhiot,
13 tell us about your -- take a few moments, tell us about
14 your qualifications, your training, your experience in
15 the field in which you're going to be testifying about
16 today.

17 A. Certainly. I'll give you the Reader's Digest
18 version, but my CV is available and will be provided
19 upon request.

20 Q. All right.

21 A. I was a police officer from 1979 to 1999 with
22 the United States Air Force, I had my training in DUI
23 enforcement and then standardized field sobriety along
24 with standardized field sobriety instructor course
25 through the Montana Law Enforcement Academy. I was also

1 certified by the Montana Division of Forensic Science as
2 a breath test operator, breath test senior operator and
3 breath test technician. I was on the Intoxilyzer 5000
4 at the time. This is an alcohol, toxicology and
5 pharmacology course. I also am certified by CMI
6 Incorporated which is the manufacturer of the
7 Intoxilyzer 5000 and 8000 and I'm certified to teach,
8 repair, operate, maintain, calibrate both of those
9 instruments by the manufacturer and I have completed
10 advanced training on the Intoxilyzer 8000.

11 I was employed by the Florida Department of
12 Law Enforcement Alcohol Testing Program 2002 to 2010 as
13 a Department Inspector and during a part of that time I
14 was responsible for South Florida by counties. I don't
15 know if Broward, I don't believe; I think it's
16 Miami-Dade and Monroe. I was responsible for research
17 and development, inspections.

18 I attended the Borkenstein Course which is at
19 Indiana University, specifically on highway traffic
20 safety, research, litigation and alcohol. I returned to
21 Indiana University and completed a course on state-level
22 program administration: How to establish quality
23 assurance, quality control; how to establish rules,
24 procedures, and interact with legislators in statutory
25 language. I then went to Lafayette Louisiana and took a

1 course on ethanal measurement and its interpretation,
2 which emphasized the different types of biological
3 measurements and human performance with alcohol. I also
4 completed a standardized field sobriety instructor
5 update course with the University of North Florida in
6 Jacksonville to maintain my certification as a
7 standardized field sobriety instructor. Also while
8 working with Florida Department of Law Enforcement
9 conducting research and any work know as dosing studies.
10 Doses is simply a dose of alcohol and then measure the
11 response.

12 Continuing, keep updated on the scientific
13 literature in the area of alcohol and human performance
14 and have done many different doses studies where we
15 would dose persons for specific alcohol concentration
16 and measure response through blood and breath, normal
17 standardized field sobriety and human performance. I
18 have been in this field working full-time for probably
19 the last 20 years. That's a very brief synopsis.

20 Formal education, I have a Bachelor of Science
21 in Criminal Justice Administration with coursework in
22 Anatomy, Physiology, Criminalistics, Biology, Chemistry
23 and the basic sciences.

24 Q. When we're done here, would you mind e-mailing
25 me your most recent CV?

1 A. I will.

2 Q. All right. Thank you. Why did you leave the
3 Florida Department of Law Enforcement in 2010?

4 A. Because the governor was cutting our pay, my
5 daughter graduated college, I left them on good terms
6 and went to do personal things.

7 Q. Okay. How long have you been doing expert
8 work?

9 A. Since 2010 for private practice. I did expert
10 work, State, as far as a State employee; but in private
11 practice since 2010.

12 Q. What did you review for this case, the Nadeem
13 Ali case?

14 A. I reviewed the video, breath test report, the
15 breath test machine monthly and annual inspections, the
16 police officer's narrative report and all documents
17 provided under discovery to include the registration,
18 narrative, the ticket, the accusation, along with
19 Florida's rules, standardized field sobriety, the 2013
20 manual, along with the video as I had mentioned before.

21 Q. Okay. What did you do in this case?

22 A. I completed -- I did a complete analysis of
23 the breath test machine, a complete analysis of
24 inspections and documents in the breath test machine's
25 history file maintained by FDLE, reviewed the breath

1 test, reviewed the police report, make sure it's
2 compliant with rules, and documented those that are in
3 noncompliance; reviewed all the breath tests between
4 2006-2013 on that specific breath test machine serial
5 number 80-001047; reviewed the video and had
6 consultations with Mr. Malove and issued a report to
7 Mr. Malove.

8 Q. All right. And your analysis, that's included
9 in your report?

10 A. Yes.

11 Q. Did you ever meet Mr. Ali?

12 A. I have not.

13 Q. Did you ever speak with him over the
14 telephone?

15 A. I did not.

16 Q. Approximately how much time have you spent on
17 this case?

18 A. Probably between four and six hours. That
19 does not include report preparation time. Analytical
20 time and consultation time; report time is probably
21 another three hours.

22 Q. Okay. How much have you been paid to date for
23 this case?

24 A. I was paid an initial \$600.00 to complete
25 consultation review and report and have been retained

1 for court; paid \$1200.00 for court plus travel expenses,
2 so total compensation to date is \$3600.00.

3 Q. Okay. Tell us about your opinions in this
4 case?

5 A. One, the speeding which was the initial
6 violation that he was stopped for has been researched by
7 the Natational Highway Traffic Safety Administration and
8 there are 24 driving behaviors that may indicate
9 impairment. Speeding or exceeding the posted speed
10 limit is not one of those indicated. Driving below the
11 speed limit is but driving above the speed limit is not.

12 The odor of alcohol may be a sign of
13 consumption but not necessarily a sign of impairment.
14 The analogy I use is if you walk into the house on
15 Thanksgiving Day you can smell the turkey cooking in the
16 oven but you really can't tell me how many pounds turkey
17 may be in the oven.

18 I reviewed the field sobriety narrative that
19 was written by the officer and I noticed that the
20 officer documented that he had "resting nystagmus". A
21 person displaying resting nystagmus has a high potential
22 of a medical cause of the nystagmus versus impairment.
23 That is from the NHTSA standards on field sobriety.
24 There is no roadside video, the only video I saw was
25 from the jail.

1 The officer also documented his walk and turn
2 and one-leg stand but did not document specifics, and no
3 video so I could not ascertain. The officer also did
4 what's known as finger to nose which is a field sobriety
5 test that was rejected by the National Highway Traffic
6 Safety Administration as part of the standardized
7 testing, it has no objective standard associated with
8 personal performance in finger to nose. This is pretty
9 much not part of the field sobriety test.

10 I conducted a review of the breath test and
11 the breath test was two hours after the time of the stop
12 and may not be an accurate representation of the alcohol
13 at the time of the stop. I conducted an audit on the
14 breath test machine and found different issues with
15 non-compliance, September of 2012; January, 2013 -- I'm
16 sorry, February 2013; May 2013; and breath alcohol,
17 mouth alcohol detection test on the October 26th, 2013.

18 I then reviewed the video but that was
19 completed after the breath test at the station house,
20 and observed extreme lack of impairment that would
21 support the breath test results in this case.

22 Q. Okay. All right. So let's start with page 2
23 of your report where you have the Vehicle in Motion
24 section, and you referenced the National Highway Traffic
25 Safety Administration published research, 24 driving

1 behaviors commonly found to be indicators of alcohol
2 impairment, and exceeding the speed posted was not
3 listed as an indicator. Are you aware that the National
4 Highway Traffic Safety Administration publishes traffic
5 safety facts?

6 A. Yes.

7 Q. Okay. Do you know that the National Highway
8 Traffic Safety Administration facts for 2012 indicate
9 that 42% of drivers in fatal traffic crashes had a blood
10 alcohol content of .08 or higher, were speeding?

11 A. No, I'm not familiar with that specific 2012
12 fact sheet. I don't have the reference in front of me.

13 Q. Okay. You would agree that speeding is one of
14 the most prevalent factors contributing to traffic
15 crashes; correct?

16 A. I don't have the specifics of prevalence. It
17 can be a cause of traffic crashes, yes.

18 Q. Okay. You think that it's a good idea for
19 police to stop drivers who are exceeding the speed
20 limit?

21 A. I do.

22 Q. Okay.

23 A. Discretionary guidelines within the
24 department, meaning I don't think it's reasonable to
25 stop somebody for one mile over but if there is a

1 tolerance of 10 miles, 5 miles, whatever is established,
2 I think it is a good idea to stop speeding drivers.

3 Q. I understand. You referenced the National
4 Highway Traffic Safety Administration manual - I guess
5 there's two you referenced in your report - one is 2013
6 and one is 2006?

7 A. Correct.

8 Q. Okay. In Chapter 5 of the March 2013 manual,
9 it's called Phase 1 Vehicle In Motion, which is similar
10 to the heading in your report, and that chapter says
11 that the first task is observing a vehicle in motion and
12 that your attention may be drawn to a vehicle by such
13 things as a moving traffic violation; and my question
14 is, isn't speeding a moving traffic violation?

15 A. My understanding of the statute, in Florida it
16 is.

17 Q. Okay. And you understand the defendant in
18 this case was stopped for speeding?

19 A. I do.

20 Q. And in Sergeant Jacobs report he didn't
21 indicate that he believed the defendant was driving
22 under the influence of alcohol solely because the
23 defendant was speeding; did he?

24 A. Not to my recollection.

25 Q. Okay. When officers make a determination to

1 conduct a DUI investigation they do that based on a
2 totality of the circumstances; correct?

3 A. They should, yes.

4 Q. Okay. And during your time as a police
5 officer did you have the opportunity to conduct DUI
6 investigations?

7 A. I did.

8 Q. All right. Was that a regular part of your
9 job or something you just did occasionally?

10 A. No, it was a regular part of my duties,
11 depending on what timeframe. I was assigned to the DUI
12 Task Force during the time, so yes it was a regular part
13 of my duties.

14 Q. Okay. I'm looking at your report and I'm
15 looking at driver contact and you noticed -- you noted
16 that upon making contact with the defendant that the
17 officer reported that at the driver's door he could
18 smell a strong odor commonly associated with an
19 alcoholic beverage emitting from the defendant's breath.
20 And what you told me earlier, what you mentioned was
21 that an odor of alcohol is not necessarily a sign of
22 impairment, when you referenced the turkey and
23 Thanksgiving and the pounds of the turkey; that's
24 correct, right?

25 A. That is correct. There is actually research

1 with law enforcement officers to evaluate the strength
2 of the odor of an alcohol by correlating it to an
3 alcohol concentration, and that research showed that you
4 cannot, based on strength of the odor, determine an
5 alcohol content.

6 Q. Okay. So it's not necessarily a sign of
7 impairment but it can be a sign; is that correct?

8 A. It can be a sign of consumption. You cannot
9 determine impairment simply by the odor. Now, having
10 said that, a person who is impaired may have an odor.

11 Q. So it's one of the factors an officer would
12 consider in conducting a DUI investigation?

13 A. It would be noteworthy and he can document it
14 in his report that he detected a strong odor, yes.

15 Q. All right. Sergeant Jacobs also reported that
16 he observed the defendant's eyes to be bloodshot.
17 That's in his report; right?

18 A. Yes.

19 Q. And he also noted that the defendant's eyes
20 were glassy in his report; correct?

21 A. Correct.

22 Q. Sergeant Jacobs also reported the defendant's
23 speech to be extremely slurred; correct?

24 A. Correct.

25 Q. He also reported defendant's movement to be

1 lethargic?

2 A. Correct.

3 Q. That's correct. Okay. And according to his
4 report the defendant also admitted to consuming alcohol
5 to the sergeant; is that correct?

6 A. I would have to review the report for that
7 specific quote but I have no reason to doubt your review
8 of the report.

9 Q. Okay. So if you as a police officer, you came
10 across a driver who is stopped for speeding; who is slow
11 to provide his license; had an odor of alcohol coming
12 from his breath; had bloodshot, glassy eyes; extremely
13 slurred speech; lethargic movements; and admitted to
14 consuming alcohol, would you then conduct a DUI
15 investigation on that driver for possible impairment?

16 A. I may, yes.

17 Q. Okay. And why would you do that?

18 A. Because the preliminary contact with the
19 driver may indicate further investigation is warranted.

20 Q. And I would gather that if we were to add to
21 the scenario, if I were to tell you that the driver's
22 pants were wet in the crotch area and you located a
23 bottle of rum on the floor of the driver's vehicle, you
24 still would conduct a DUI investigation?

25 A. Those things would not prevent me from

1 conducting a DUI.

2 Q. Okay. They wouldn't change your mind?

3 A. I'm sorry?

4 Q. They wouldn't change your mind from initially
5 conducting an investigation?

6 A. They would not.

7 Q. Okay. So if you were considering, you know,
8 all the things we just discussed, would you not consider
9 the odor of the alcohol as an indicator of impairment?

10 A. No, not as an indicator of impairment but an
11 indicator of consumption.

12 Q. Okay. And then you would take that into
13 totality of the circumstances when deciding to conduct
14 your investigation?

15 A. I would take note of it, yes.

16 Q. Okay. But you wouldn't consider the odor of
17 alcohol to be a sign of a lack of impairment; would you?

18 A. I wouldn't consider it either way. I would
19 consider it a sign of consumption.

20 Q. Okay. Now, in your report, the driver
21 contact, you noted that there was an odor of -- the
22 officer reported an odor of alcohol, but the other
23 things that I mentioned: The slurred speech, the
24 lethargic movements, the glassy eyes, bloodshot eyes,
25 you didn't note in your report under driver contact. Is

1 there a reason for that?

2 A. Well, I'm not just going to rewrite the entire
3 officer's narrative. My client, the attorney, has a
4 copy of the report. I'm just indicating the odor of
5 alcohol is not an indicator of impairment. That's why
6 it's in my report. Now, the other things, lay persons
7 can very easily determine that many different things can
8 cause that. Bloodshot eyes, glassy eyes are not
9 necessarily indicators of impairment but would be
10 present in persons who are impaired.

11 Q. So each thing alone isn't necessarily the
12 indicator of impairment but when you take all the
13 information together you have an indication of alcohol
14 impairment?

15 A. You may.

16 Q. Okay. When the officer decided to conduct a
17 DUI investigation, do you think that there was anything
18 lacking that he should have considered?

19 A. I don't know. I don't know. I have what he
20 wrote in his narrative report, I wasn't there and I
21 don't know what other observations or lack of
22 observations or communication, and there is no video to
23 review so I don't know if I can answer that question.

24 Q. Okay. I mean, I know you weren't there, but
25 just for the record, you weren't there, right, when this

1 happened?

2 A. I made it clear on the record I was not
3 present at the time of the arrest.

4 Q. And you didn't -- there is no video so you
5 didn't see any of the officer's field sobriety
6 exercises; correct?

7 A. At roadside, I did not.

8 Q. Okay. Do you know how old the defendant was
9 when he was arrested?

10 A. I can look it up. It's in the documents.

11 Q. Okay. I just wondered if you knew he was 19.
12 You didn't review any audio or video of Officer Manning
13 going through the field sobriety exercise with the
14 defendant; correct?

15 A. None was provided.

16 Q. Okay. I don't have any, so ...

17 A. Okay.

18 Q. With respect to the field sobriety exercise
19 that Officer Manning conducted, you reviewed the
20 probable cause affidavit and his incident report;
21 correct?

22 A. Correct.

23 Q. Okay. What is the purpose of administering
24 field sobriety exercises?

25 A. The purpose is to help the officer make an

1 arrest/don't arrest decision.

2 Q. And what types of things should an officer
3 look for?

4 A. Well, there are very specific objective
5 standards that the officer is looking for in the
6 standardized field sobriety test. HGN has 4, the walk
7 and turn has 8 and the one-leg stand has 4.

8 Q. Okay. So the HGN, walk and turn and the
9 one-leg stand, those, you consider those to be
10 sanctioned and appropriate exercises?

11 A. I consider them to be -- I don't consider they
12 are -- they are published by the National Highway
13 Traffic Safety Administration as the standardized field
14 sobriety battery of tests taught throughout the United
15 States, including Florida.

16 Q. And depending on, you know -- what are the
17 clues supposed to indicate to an officer?

18 A. Well, they help the officer make an
19 arrest/don't arrest decision. They were originally
20 based on the probability of alcohol above a .10 and has
21 been further researched to look for probability of
22 alcohol above a .08.

23 Q. And the purpose, would you agree, is to
24 determine if the defendant can multitask by performing
25 simple tasks?

1 A. That's part of the evaluation is multitasking,
2 yes.

3 Q. Okay. And what are the other parts?

4 A. Well, performance, coordination, understanding
5 of instructions. There's multiple parts.

6 Q. And why is it important for the officers to
7 explain the instructions to defendants before
8 administering the field sobriety exercises?

9 A. Well, there's specific instructions that must
10 be followed otherwise the officer may interpret the
11 results incorrectly and failing to meet the objective
12 standards. For example, during the walk and turn the
13 officer has to tell the individual, once you start
14 walking do not stop, because if the individual stops
15 during the walking phase then that would be counted as
16 an indicator of impairment and would only fairly be
17 counted if the officer told the individual not to stop.
18 That's just an example.

19 Q. Okay. And it's important for the officer,
20 would you agree, to give instructions to see if the
21 person going through the exercise can follow the
22 instructions?

23 A. Well, it's part of what they're looking for,
24 response and understanding and following of
25 instructions.

1 Q. All right. Let's talk about the horizontal
2 gaze nystagmus.

3 A. Yes.

4 Q. You mentioned that the officer reported that
5 there was 'resting nystagmus'. Can you tell me what
6 that is?

7 A. Resting nystagmus is when the eye is in a
8 resting, not fixated on a stimulus, that nystagmus is
9 present; when the involuntarily jerking is present; when
10 the eye is in a resting mode.

11 Q. What might that indicate?

12 A. A possible medical impairment, or possible
13 PCP, or hallucinogenic drug.

14 Q. So it could indicate that the person is on
15 some type of drugs?

16 A. It could.

17 Q. Or that they have a medical impairment, is
18 that what you said?

19 A. Yes.

20 Q. In your report, after noting that, you
21 mentioned that the horizontal gaze nystagmus test
22 completed should not be considered a valid test. Why is
23 that?

24 A. Because when an individual displays resting
25 nystagmus they have not been medically qualified for the

1 test. There are three prerequisite requirements to
2 medically qualify somebody for the HGN test. Resting
3 nystagmus is one of them.

4 Q. Did you see the part in Officer Manning's
5 report where he asked the defendant if he had anything
6 wrong with him physically or medically that would hinder
7 or impair him while completing the exercises and the
8 defendant said no, he didn't?

9 A. Correct.

10 Q. And did you see in Officer Manning's report
11 that he asked the defendant if he was under the care of
12 a doctor or taking any medications, the defendant
13 replied no?

14 A. I did.

15 Q. Okay. So would we be able to rule out a
16 medical impairment?

17 A. Absolutely not. There could be very easily
18 undiagnosed medical issues in the individual that cause
19 resting nystagmus. Just because they are not under the
20 care of a doctor at the time does not necessarily mean
21 that the nystagmus is not medically induced. That's why
22 the prerequisite testing is done and not just ask the
23 question.

24 Q. All right.

25 A. Not being under the care of a doctor does not

1 nullify natural medical cause.

2 Q. And what type of medical issues are you
3 talking about?

4 A. Well, there could be head injuries, brain
5 injuries, brain tumors, inner ear problem, balance,
6 vestibular tube problems. There's a whole litany of
7 medical issues that can cause nystagmus.

8 Q. Officer Manning noted that the defendant had
9 equal tracking during the horizontal gaze nystagmus.
10 What does that mean?

11 A. That's part of the medical prerequisite that
12 both eyes track together, meaning one eye wasn't looking
13 off to the left while one eye was -- both were tracking
14 together.

15 Q. And you didn't note that in your report
16 because -- did your analysis end when you noted resting
17 nystagmus; is that fair to say?

18 A. No. I didn't document it because there was
19 nothing unusual about it. That's what they're supposed
20 to do. I wasn't going to regurgitate the police report.

21 Q. Okay. Officer Manning also mentioned a lack
22 of smooth pursuit. What does that indicate to you?

23 A. Lack of smooth pursuit, if done properly
24 during the evaluation, is one of the indicators that the
25 officer is looking for during the HGN.

1 Q. And when there is lack of smooth pursuit what
2 does that mean?

3 A. It means that the officer has observed one of
4 the clues.

5 Q. One of the clues of impairment?

6 A. Not necessarily, no.

7 Q. One of the clues of what?

8 A. Well, there are six potential clues and one of
9 those clues is lack of smooth pursuit.

10 Q. Okay. Officer Manning also noted distinct and
11 sustained nystagmus at maximum deviation in both eyes.
12 What does that mean?

13 A. Well, it's the same thing. It's the second
14 potential clue during the HGN evaluation.

15 Q. So that there is distinct and sustained
16 nystagmus is a clue; is that correct?

17 A. Yes. If it's evaluated properly and last for
18 more than four seconds, yes.

19 Q. And what about onset of nystagmus prior to
20 45 degrees in both eyes; what does that mean?

21 A. That is the third of the clues under the HGN
22 evaluation.

23 Q. And vertical nystagmus, is that also a clue?

24 A. It is not part of the six clues, it is a
25 notation, whether it was present or not.

1 Q. Okay. What are the six clues, if you don't
2 mind me asking?

3 A. Certainly. Lack of smooth pursuit, sustained
4 and distinct nystagmus of natural deviation, and onset
5 of nystagmus prior to 45 degrees. Those are the three
6 clues, multiply by two eyes equal the total of six
7 potential clues.

8 Q. Okay. So we have all six of those in this
9 case?

10 A. If the officer documented six, yes.

11 Q. But what you're telling us is that because he
12 also documented resting nystagmus that we should ignore
13 those six clues?

14 A. Absolutely.

15 Q. Because medical impairment could also be the
16 cause of those clues?

17 A. Correct.

18 Q. If he had a medical impairment?

19 A. Correct.

20 Q. What about -- Officer Manning noted that the
21 defendant was swaying from side to side more than
22 two inches and stepped out of the starting position
23 during the horizontal gaze nystagmus. Does that
24 indicate a clue of something?

25 A. Not necessarily. When you stand with your

1 feet together for an extended period of time like that
2 people sway. Stepping out, you know, without a video to
3 review, it's noteworthy but it is not a clue as defined
4 by the specific clues for the test.

5 Q. Does alcohol impairment cause resting
6 nystagmus?

7 A. It does not.

8 Q. Okay. Let's talk about the breath test.

9 A. Okay.

10 Q. The breath test -- okay. According to the
11 incident report the defendant was stopped on Friday
12 September 13th, 2013, at 12:50 a.m., is that correct?

13 A. I have no reason to doubt it. I can look and
14 verify it, but --

15 Q. Okay. Well, if you want to look, go ahead,
16 but that's what I saw in the incident report.

17 A. Okay.

18 Q. And according to the breath alcohol test
19 affidavit, the defendant gave his second sample of
20 breath at 2:19 a.m., is that what you have?

21 A. I don't doubt it. I'd have to go through it
22 to verify.

23 Q. Okay. I doublechecked it but --

24 A. Yes. Breath test was ended at 2:20, but it's
25 2:19.

1 Q. All right. So that's one hour and 29 minutes
2 after the defendant was stopped?

3 A. Correct. So there is a typo, an incorrect, in
4 my report.

5 Q. Okay. You know where I was going. That was
6 my next question.

7 A. Yes. There's obviously a typo. It should be
8 more than an hour.

9 Q. Okay. So if it was more than an hour then do
10 you agree that the result may not be an accurate
11 representation of the defendant's alcohol concentration
12 at the time of driving?

13 A. Yes, that statement still holds true.

14 Q. Okay. And why is that?

15 A. Well, because alcohol absorption and
16 elimination is a dynamic process and as time goes by
17 alcohol rises and lowers.

18 Q. So at the time of the defendant giving the
19 breath sample his blood alcohol content is going to be
20 lower than it was at the time of his driving?

21 A. Not necessarily true. Depends on when he
22 stopped drinking and where the absorption ended.
23 There's a lot of dynamic factors involved with that
24 statement and it's not necessarily a true statement they
25 will always be lower at time of test.

1 Q. Okay. People don't generally sober up as time
2 goes on?

3 A. After they achieve peak alcohol they start
4 eliminating alcohol, yes.

5 Q. Okay. What if the defendant stopped drinking
6 at 10:15 p.m?

7 A. Well, it depends on his metabolism, absorption
8 rate, food. There's a lot of variables between
9 absorption and peak and elimination. It's possible he
10 was still absorbing.

11 Q. Okay. So the inspection of the Intoxilyzer
12 8000, the one used to take the defendant's breath
13 sample, was in compliance on September 28th, 2013; is
14 that correct?

15 A. The two inspections bracketing were in
16 compliance.

17 Q. Okay.

18 A. Breath test provided no error message, so to
19 that extent, yes. Let me just check.

20 Q. Sure.

21 A. Because I may have to clarify that answer.
22 There was an error extension message on the October 26th
23 inspection, of alcohol free, mouth alcohol range
24 exceeded, and the inspector documented that she used too
25 much mouth alcohol solution. That is the only error

1 message associated with those two inspections.

2 Q. Okay. That doesn't affect our test results;
3 right?

4 A. It was the inspection just after and it was
5 not during the breath test.

6 Q. When was the -- first of all, did you ever
7 inspect the Intoxilyzer 8000 in this case? You?

8 A. I may have but not as a result of this case.
9 I may have looked at that machine when I worked with the
10 State of Florida; but I have not since 2010, I can tell
11 you that.

12 Q. Okay. So if you had looked at it, last time
13 would have been in 2010 or prior?

14 A. Correct.

15 Q. Do you have any reason why the defendant's
16 blood alcohol results of .193 and .189 may not be
17 accurate?

18 A. Well, they may not be accurate because of a
19 lot of things. It could be breathing patterns, there
20 may be mouth alcohol that's not picked up by the
21 machine, there may be gurgitation taking place, those
22 types of things.

23 Q. Okay. But is there anything specific that you
24 could point to that said this, this does not make it
25 accurate? I understand there's possibilities and other

1 things but did you come up with anything that
2 definitely, you know, raises a red flag here?

3 A. Other than the disconnect between performance
4 and results, no.

5 Q. When you say "the disconnect between
6 performance and results," what do you mean? Are you
7 talking about the defendant's performance that you saw
8 on the video?

9 A. Yes.

10 Q. Okay. But other than that you don't have any
11 issues with the test results themselves?

12 A. There's no errors associated with the
13 machine's performance on that breath test.

14 Q. Okay. You reviewed the volumes of breath the
15 defendant provided; correct?

16 A. I did.

17 Q. And they were sufficient; correct?

18 A. They were valid samples according to the
19 machine, yes.

20 Q. Okay. And you don't -- do you have any issues
21 with any of the inspections on the machine?

22 A. Well, they're broken down in my report. I'd
23 have to --

24 Q. Yes, I didn't see any but I'm not an expert on
25 the instrument myself.

1 A. Well -- and this is, you know, a two-year
2 review, but in September of 2012 they had to send it out
3 because of a "Mem Full Error Message." FDLE had to
4 repair it. February 2013 it had dry gas regulator
5 problem and they had to ship it off to FDLE. May 2013
6 they had to repeat the 08 dry gas test. Let me just
7 review that May inspection real quick. And they
8 explained the 08 dry gas repeat because of the wrong
9 simulator hooked up and they didn't follow proper
10 procedure during the inspection.

11 Q. Okay. But that doesn't have anything to do
12 with our test in September; does it?

13 A. No, it doesn't appear to.

14 Q. Okay. The -- just one more time I want to
15 clarify. I want to make sure I covered it. The
16 August 24, 2013 inspection, the instrument was in
17 compliance; right?

18 A. It met the standards of 11D-8, yes.

19 Q. Okay. And then the defendant gave his sample
20 in September, September 23rd, 2013. You agree with me
21 there; right?

22 A. I do.

23 Q. And September 28th, 2013, the instrument was
24 still in compliance?

25 A. It met the compliance requirements during the

1 September 28th inspection, yes.

2 Q. Okay. So let's talk about video. You saw
3 Officer Botero give instructions for exercises to the
4 defendant on video; right?

5 A. I did.

6 Q. When she was giving the defendant the
7 instructions for the walk and turn exercise, did you see
8 the defendant put his right hand on the wall to stop
9 himself from falling over?

10 A. I saw him put his hand on the wall, I don't
11 know if it was necessarily to stop him from falling over
12 but I did see him put his hand on the wall.

13 Q. Okay. And, you know, you mentioned earlier
14 the walk and turn exercise is a standard field sobriety
15 test; is that correct?

16 A. It is.

17 Q. Okay. In your report you said that it should
18 be noted that the tests completed on video are not
19 standardized field sobriety tests and have no validity,
20 so is that another typo?

21 A. No. The walk and turn and the finger to nose,
22 they are not doing the standardized tests. Those breath
23 test operators are not certified as standardized field
24 sobriety. They are following the checklist and are not
25 doing the criteria of the standardized field sobriety,

1 and I will refer you back to page 4 of my report as far
2 as them altering the standardized testing for that
3 purpose.

4 Q. So you're saying the walk and turn is a
5 standardized test; right?

6 A. It is, but what was done at the booking room
7 is not the standardized walk and turn as supplied by
8 NHTSA.

9 Q. So Officer Botero's version of the walk and
10 turn isn't standardized; is that what you're saying?

11 A. That is what I'm saying. And I don't know if
12 she was following the specific checklist or -- I'm sure
13 she was reading from a checklist of procedures form that
14 may not be accurate.

15 Q. Okay. When you referred to page 4, you were
16 referring me to page 4, what was that exactly?

17 A. Well, that's the NHTSA statement about the
18 emphasis of administering the procedures in a
19 standardized manner. The standardized clues must be
20 followed.

21 Q. Okay. And that's from the 2006 manual; right?

22 A. Correct.

23 Q. And I noticed you referred to the 2013 manual
24 as well in your report. Are you aware that that
25 paragraph isn't in the 2013 manual?

1 A. That specific statement is not.

2 Q. So you're aware of that; right?

3 A. I am.

4 Q. Okay. And are you aware that in the 2006
5 version in the Administrator's Guide in the preface it
6 states that, "Variations from the ideal, i.e. the
7 inability to find a perfectly smooth surface of roadside
8 may have some effect on the evidentiary weight given the
9 results, however, this doesn't necessarily make the test
10 invalid"?

11 A. That's referring to environmental conditions.

12 Q. Okay.

13 A. Not referring to procedures and standardized
14 clues that are observed. That's, for example -- and
15 they give the example of debris in the roadway or
16 unlevel surface, not talking about procedures and clues
17 that the officer is looking for, and the training of the
18 officer, or procedures used by the officer.

19 Q. What was it about Officer Botero's walk and
20 turn that you didn't agree with?

21 A. I would have to look at the video again, but
22 my recollection is that the standardized instructions
23 were not given and the standardized clues as defined by
24 NHTSA were not documented.

25 Q. Okay. Do you recall seeing the defendant miss

1 heel to toe on several steps in the video?

2 A. I don't recall. I would have to look at the
3 video again but I'm not --

4 Q. Okay. Do you recall seeing the defendant
5 almost fall over when he pivoted on the heel to toe
6 exercise?

7 A. He lost his balance but I don't know if he
8 almost fell over, but yes.

9 Q. When the defendant was answering questions did
10 you hear him say that it was Saturday morning?

11 A. I don't recall specifically that, but --

12 Q. Okay. But you know when he was being asked
13 the questions it was actually Friday morning; right?

14 A. I have no reason to doubt that. I would have
15 to look at the timeline.

16 Q. Okay. Do you remember when the defendant was
17 asked, "Are you under the influence of an alcoholic
18 beverage now?", that he answered yes?

19 A. I don't recall that right off the top.

20 Q. Okay. Do you recall that the defendant said,
21 at approximately 2:31 a.m., that he last slept 12 to 14
22 hours ago and he said that it was when he we went to bed
23 Wednesday night and woke up Thursday morning?

24 A. I don't recall that specific statement but I
25 have no reason to doubt that was the defendant's

1 statement.

2 Q. Okay. Do you think a miscalculation like that
3 could be an indication of impairment?

4 A. It could. Many things could.

5 Q. All right. What percentage of your work as an
6 expert is for defense work?

7 A. Probably 80 to 90.

8 Q. Okay. What jurisdictions do you testify in as
9 an expert?

10 A. Any and all the United States.

11 Q. Okay. Most of the country or, you know, is
12 your practice focused in certain states?

13 A. The majority in Georgia and Florida.

14 Q. Georgia and Florida. Okay. What percentage
15 of your salary comes from this type of work that you're
16 doing right now?

17 A. Probably -- for case review it is about 30
18 percent and then courtroom is about 35 percent.
19 Deposition is extremely low.

20 Q. What I'm saying is, as an expert in alcohol
21 cases, aside from being an expert in alcohol cases, do
22 you have other sources of employment or is this your
23 sole occupation now?

24 A. It's my sole occupation, but I am retired from
25 the Air Force and paid a pension.

1 Q. I understand. I understand. So you mentioned
2 that -- I'm sorry. Approximately how much of your
3 income comes from this type of work, expert work?

4 A. From this type of work --

5 Q. Expert work?

6 A. Expert work is 100% of the business income and
7 probably 80% of total income.

8 Q. Okay. Great. Thank you. That's what I was
9 looking for.

10 A. And the way you word that question is from
11 expert work. That's not broken down between civil,
12 criminal, the State, Defense. I don't have those
13 specific numbers.

14 Q. Yes, that's fine. I'm just looking for
15 ballpark.

16 A. Okay.

17 Q. When did you start working for Mr. Malove's
18 clients?

19 A. On this particular case?

20 Q. No, no. When did you start working for any
21 clients that are represented by Mr. Malove?

22 A. I can't answer that. I don't know when he
23 hired me.

24 Q. Okay.

25 A. Or if this is the first one. I don't know.

1 Q. Approximately how many cases have you had with
2 Mr. Malove's clients?

3 A. I can name three right now, but other than
4 that I don't know.

5 Q. Okay. How many active cases do you have right
6 now with Mr. Malove?

7 A. Two.

8 Q. And the other one is Snowman?

9 A. Yes, sir.

10 Q. Okay. And you're going to be available to
11 come to trial for this case in Broward County?

12 A. I am.

13 Q. Okay, Mr. Malhiot, I'm almost done. I'd just
14 like a moment to review my notes and see if I have
15 anything else I'd like to ask you; all right?

16 A. Absolutely. Thank you.

17 Q. So just hold on for me for a moment.

18 Hello?

19 MR. MALOVE: Yes.

20 MR. McCORMACK: Hello?

21 THE WITNESS: Sounds good.

22 MR. MALOVE: Oh, he's there.

23 BY MR. McCORMACK:

24 Q. Okay. So just a few final questions. If
25 there were any problems with the Intoxilyzer 8000

1 instrumentation or the inspection, the Florida
2 Department of Law Enforcement would have notified the
3 Broward County Sheriff's Office of any of those issues;
4 correct?

5 A. Potentially, yes. But on the exact opposite,
6 the Sheriff's Office may find out about it before FDLE
7 does; so potentially, not an absolute.

8 Q. Okay. But what I'm asking is if FDLE had
9 noticed any issues with their inspections while they
10 were inspecting the machine or working on the
11 instrument, they would have notified -- it's their job
12 to notify the Broward County Sheriff's Office; is that
13 correct?

14 A. No. They have no obligation to notify them.
15 They would repair it, return it, the documentation may
16 indicate what they found, but there's no obligation
17 under 11D-8 for FDLE to mandate a notification to the
18 agency.

19 MR. McCORMACK: Okay. All right. Thank you
20 for your time, Mr. Malhiot.

21 MR. MALOVE: Just for the record, could you
22 let me know if there is anybody else in attendance
23 at the deposition besides the three of us?

24 MR. McCORMACK: Yes. We have the court
25 reporter who is here, and Franca Dicienzo has been

1 in and out.

2 MR. MALOVE: Okay. Is she there now?

3 MR. McCORMACK: She's here now.

4 MR. MALOVE: Okay. Anything else?

5 MR. McCORMACK: I don't have any other
6 questions.

7 MR. MALOVE: I thought that she was retired.
8 Hi Franco.

9 DET. DICIENZO: Hi.

10 MR. MALOVE: Thanks for your contribution.
11 It's always great to have you around.

12 DET. DICIENZO: Thank you.

13 MR. MALOVE: Okay, anything else, guys?

14 MR. McCORMACK: No, I think that's it. If
15 Mr. Malhiot could just send me his resume when he
16 gets the chance.

17 MR. MALOVE: Absolutely.

18 THE WITNESS: I got your note. I'll send it
19 to you.

20 MR. McCORMACK: And you have my e-mail I
21 think, because I e-mailed you the subpoena last
22 week.

23 THE WITNESS: I got it.

24 MR. McCORMACK: All right. Great. All right,
25 thanks fellows.

1 MR. MALOVE: Thank you.

2 THE WITNESS: Thank you.

3 MR. MALOVE: By-bye.

4 MR. McCORMACK: Bye.

5

6 (Whereupon, the deposition concluded at 3:32 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

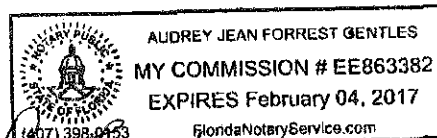
1
 2 STATE OF FLORIDA)
 3 COUNTY OF BROWARD)

4 I, AUDREY J. FORREST GENTLES, Court Reporter and
 5 Notary Public in and for the State of Florida at Large,

6 DO HEREBY CERTIFY that the foregoing deposition
 7 was taken before me at the time and place therein
 8 designated; that the deponent MATTHEW MALHIOT was by me duly
 9 sworn, and the foregoing transcript, pages 1 through 43
 10 inclusive, is a true and correct record of the testimony
 11 given by the witness.

12 I FURTHER CERTIFY that I am not a relative or
 13 employee of any of the parties, nor relative or employee of
 14 such attorney or counsel, or financially interested in the
 15 foregoing action.

16 WITNESS MY HAND AND OFFICIAL SEAL this 28th day of
 17 May, 2015.



19
 20 *Audrey J. Forrest Gentles*
 21 Audrey J. Forrest Gentles
 22 Notary Public
 23 State of Florida at Large
 24 Commission #EE863382
 25 Expires February 4, 2017