

Witness: Rick Swope

Subject/Topic: Qualifications to testify are “overinflated”; “He’s not an expert, but he plays one on t.v.”

Area of Cross Exam: Witness not qualified to testify as expert; Qualifications or overstated and not relevant and/or sufficiently beyond common knowledge to qualify as an “expert” under rules of evidence; (Discrepancies in CV and qualifications)

Fact Points

Source/Exhibit

Education: B.S. in Criminal Justice from St. Thomas

University in Miami and a “dual degree” M.S. in engineering

And management from the University of Miami; implies that

He is qualified to talk about the Intoxilyzer based on his education,

Particularly in “engineering”;

Concessions:

-Not an electrical engineer

Kierst, p. 14

-“dual degree” in “industrial engineering”

And management;

-not an expert in infrared technology

Zigarac, p.99

Tip: Although he has a master’s degree in industrial engineering, this witness is not qualified to talk about the Intoxilyzer because he doesn’t possess an engineering degree in mechanical engineering or electrical engineering or computer science which would be the education relevant to the Intoxilyzer and how it works.

Teaching and training experience: “Certified” by the State of Florida

to teach SFST and SFST Instructor Course.

Concessions:

- 1) He’s certified or properly credentialed to be a substitute teacher in Florida Schools and possesses the requisite permit to instruct and further to instruct in the subject matter. He states that he has assisted in teaching courses. He is allowed to assist with the teaching, but is not authorized to sign off on the certificates or permits of the participants. Again, he’s present at the trainings

and helps write course outlines, but cannot signoff as the official trainer.

Kierst, P. 10

Zigarac, p. 21

2) Never even took the instructor course

“NHTSA Certified” Instructor: He claims to be certified by NHTSA to instruct SFST basic and instructor and that he has instructed hundreds cops throughout Florida in two transcripts.

Tip: NHTSA doesn’t “certify”; ask to see his certification or documentation in discovery and in front of the Court; He will have nothing on NHTSA stationary that shows he is “certified” to teach. At most he has a “certificate” that he completed the basic and instructor courses.

Concessions:

1) He’s been through the NHTSA SFST and SFST Instructor

Curriculum as a LEO; Argument Note: the dates when he would have

Been trained all prior trainings in SFST were prior to 1990;

His training isn’t current and having gone through SFST Basic

And Instructor school doesn’t give him any “specialized” skill

Or training beyond what any other LEO officer, particularly the

Arresting officer that qualifies him as an expert; there is no reference

Indicating he has ever attended an SFST refresher course which is probably

required by most states;

2) His “training” of hundreds of LEOs consists of being present at

SFST training and either observing or assisting a state certified

inspector. He can do the work, but will admit that he is not

Credentialed to “sign off” on the training so that he does

Some part of the training, but the properly credentialed state

Training inspector signs off on it or “certifies” it; Note: the

Analogy to use is that he isn’t the professor, he’s the student

“teaching assistant”;

Zigarac, p. 21

- 3) Has taught at defense DUI seminars on the the Intoxilyzer
And on SFST and has made lots of \$\$\$ doing so. Note:
Teaching a bunch of defense attorneys an outdated, slanted
Course based on NHTSA’s curriculum for a handsome fee,
Doesn’t necessarily qualify this witness as having specialized
Knowledge or expertise beyond the normal LEO or arresting
Officer in the case.

Zigarac, Kierst

Publications: Claims to have written multiple articles for the DUI Law and Science Journal and has written a chapter on accident recon for a Mitchie publication.

Concessions:

- 1) The DUI Law and Science Journal is a DUI defense
Lawyer journal by Richard Essen, a well known Florida
Defense attorney;
- 2) Articles/DUI Law and Science Journal not subject to
(scientific) peer review;
- 3) Doesn’t know/articles not published under his “byline”
- 4) Doesn’t know the name of the journals he has been published
In; all he knows is that he was contacted and asked to write
Articles by someone and he did; can’t even give dates of
Publication on his articles;

Ciriago, p. 50-52

Tips: Witness can never produce copies of his “articles”; Ask for them in pretrial discovery and at trial so they can be read and reviewed and effectively cross examined. There are two articles that we have from DUI Law and Science Journal, but this witness isn’t listed as an author in the edition he claims to have written nor does his name appear as a credit as an author or contributor. Find out if he has anything more recent since 1999; He will admit that at least one of

his original articles has been “reprinted” in other defense journals, but he doesn’t know names of the journals or publication dates; He seems to count the same article as a “publication” every time it appears. It’s just the same thing repeated, it’s not new so it is disingenuous at best to claim to be published multiple times, i.e. 4 times, when the same article has simply been printed over and over only in a different publication and when you can’t say with any credibility that the publication appears under your name. Further, these “articles” are nothing more than the opinion of a disgruntled ex-cop. Anyone has an opinion and just because this guy has one that has been put into writing doesn’t make him an “expert” qualified to testify in the particular subject matter.

“Scientific” Studies: Witness claims that he has performed “studies” both as a LEO and in his “private” practice on the Intoxilyzer 5000 and related topics such as 2100:1 partition ratio, correlation studies, and mouth alcohol.

Concessions:

- 1) One of his “studies” is his participation as a LEO in the selection studies for the selection of the Intoxilyzer 5000 as the breath test device to be used for evidentiary purposes in Florida back in the early mid 1990’s. His involvement was that he received some training in the Intoxilyzer and then actually performed the breath tests on the subjects, some were arrested drunks, others were given measured alcohol, and others were just test subject. He then recorded the data and forwarded it up the chain of command for review, compilation. Note: He’s the data collector, again, the undergrad student that is helping the Ph.D./Ph.D. candidate collect the data, assemble it and forward it. He has never “analyzed, reported, or published his data”, but thinks someone else named Dr. Jensen did, but he’s not sure.
- 2) His studies in private practice consist of using privately owned (owned by defense attorneys) instrument to perform tests, experiments blowing all kinds of substances besides ethyl alcohol into the instrument, tearing it down and deliberately breaking it to “blow it up” and then determine the validity of the results.
- 3) He has never done anything more than try to “blow up” the instrument. He has never published even raw data or attempted to publish any results of these “studies. Thinks maybe Dr. Jensen did. Note: there is no raw data, and he has never published anything on his studies and doesn’t really know for sure but will reply that he doesn’t need that kind of thing to know that the Intoxilyzer doesn’t work right.
- 4) He has performed these “studies” and testified about them in court numerous times, even though nothing has yet been published.

Doesn't need publication to be able to discuss findings in court,
paraphrase: publication really unnecessary.

Tip: Consider probing on knowledge, training and familiarity with scientific method of study and testing after refreshing yourself on the subject. The "studies" this witness claims to have done weren't done according to any semblance or awareness of the scientific method. Not only does this guy lack any training or education in scientific methodology, but also has no idea or concern that valid studies that are accepted and given credibility in the scientific world are conducted according to an accepted scientific method, subjected to peer review, and, repeatable. He follows no guidelines for proper study, and doesn't care that there is a scientific method to follow. In his arrogance, he thinks that because he has collected data and torn apart instruments and done breath tests with all sorts of chemicals and caused the machine to report outrageous results, that he is qualified to testify about it. Just because he has worked on cars and changes his own oil doesn't make him an auto mechanic, much less an automotive engineer!

Intoxilyzer training:

Participation in intoxilyzer selection studies, certification as an intoxilyzer operator, and as a maintenance technician, and his maintenance of both state instruments used for evidentiary purposes and for training purposes at training academy and criminal defense firms qualifies witness as an expert on all aspects of the intoxilyzer.

Concessions:

- 1) Never authorized by the State of Florida or CMI to repair Intoxilyzers. Admits that whenever repairs were required when He was a maintenance officer for Broward, he would send the Unit out to CMI; Kierst, p.33
- 2) He was not a "certified" maintenance technician. Although He performed some monthly inspections, he was not properly Credentialed by the State to sign off on the maintenance reports, A certified maintenance technician had to do that. Zigarac., p.3
- 3) After 1988, did not officially perform any monthly inspections, Someone else did that. Zigarac, p.42-43

Tip: Recent or current work on Intoxilyzers involves instruments used in training or at the defense attorneys offices. These aren't done under the same rules and procedures as the maintenance and repairs of the instruments used for law enforcement/evidentiary purposes in the criminal case, and this witness will probably admit that. He'll further say that he does it according to his own "standards" based on his "experience" with the Intoxilyzer. It's apples and oranges.

- 4) He has toured CMI factory and has seen the Intoxilyzer being built;

He knows how the units are put together. Note: This makes him an "expert" on the Intoxilyzer, NOT!

Tip: Other than a factory tour and training on the instrument as A certified operator and then being a garage mechanic on the instrument, he is not qualified to testify as an expert. Again, changing your own oil at home in your garage doesn't make you an automotive engineer. Seeing the car built in the factory in Detroit, doesn't make you an expert on the combustion engine.

- 5) He was a certified breath testing technician. He went through the 40

Hour certification course (and nothing else). Last certified in 19??.

After witness left law enforcement he was still certified breath testing technician until 19?? When he let his certification lapse

because he didn't need it anymore because he was by then, in

"private" practice. Certified breath techs required to be requalified

Annually in order to give evidentiary breath tests for criminal cases. Will say

that he was a certified technician but will admit that he was not qualified to

give evidentiary breath tests even after he was in private practice claiming to

be a certified breath technician because he did not re qualify as required to

do breath tests;

Ciriago?

Qualified/testified as an expert in hundreds of cases.

Concessions:

- 1) There have been times when he's been called to court, but

Never testified. He doesn't know the reason why.

Kierst,
Bluethin

2) Two cases where he was not permitted to testify/

Was not qualified as an expert on the intoxilyzer.

Kierst

Bluethin

Tip: Confront witness with these rulings and the specifics to attack his credibility and to attack his qualifications, especially if he's there to talk about the Intoxilyzer. This needs to be asked on voir dire and needs to be cited in pretrial motions. File a Motion in Limine in front of the court.