In The Fifteenth Judicial Circuit Court In

and For Palm Beach County, Florida

Criminal Division

Case No. 98-010622 CF A02

STATE OF FLORIDA,

vs.

JOHN CHESTER KING,

Defendant.

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DEPOSITION OF RICK SWOPE

Taken before Lori Ann Ayaz, Notary Public in and for the State of Florida at Large, pursuant to notice of taking deposition filed by the State in the above cause.

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ORIGINAL

Tuesday, April 6, 1999
State Attorney's Office
West Palm Beach, Florida 33401
9:02 a.m. - 9:43 a.m.

APPEARANCES:

On behalf of the State:
BARRY E. KRISCHER, STATE ATTORNEY
401 North Dixie Highway
West Palm Beach, Florida 33401
By: DALIAH HANDEL WEISS, ESQUIRE
Assistant State Attorney

On behalf of the Defendant:
RICHARD L. JORDANBY, PUBLIC DEFENDER
421 3rd Street
West Palm Beach, Florida 33401
By: RICHARD JAROLEM, ESQUIRE
Assistant Public Defender

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I N D E X

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PROCEEDINGS

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Thereupon,

RICK SWOPE,

being by the undersigned Notary Public first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

DIRECT (RICK SWOPE)

BY MRS. WEISS:

Q. Could you please state your name for the record?

A. Rick Swope, S-W-O-P-E.

Q. Where are you employed?

A. Employed by Swope Reconstruction, 8211 S.W. 28th Street in Davie, Florida and I also have an Atlanta address; 1355 N.E. Peach Tree Street, Suite 150, Atlanta.

Q. Where are you based out of?

A. Well, mainly, Fort Lauderdale, although, I go to Atlanta quite frequently.

Q. What, primarily, is your concentration of work?

A. It's about 90 percent accident reconstruction and it's about 10 percent breath or field sobriety cases.

Q. Tell me a little bit about your background and training.

A. You don't know that by that now?

Q. It's been a while. I think I dealt with you once a few years ago.

A. I was a police officer for 15 years. The last six years I was with the Broward County Sheriff's Office. Four of those six years I was the administrative coordinator of the DUI Task Force, Traffic Homicide Unit. I began breath testing, or being involved in breath testing in 1974. I am still currently involved in breath testing. When I was at the sheriff's office, I did the budgeting, also, worked on the machines that were present at the sheriff's office, I think we had four at that time or six, I am not sure.

The first couple years I was in Florida we used different types of machines, so the actual 5,000 Series did not come in to Florida until -- I think we got it in '85, but really didn't start using it for testing until '86, which was the 64 Series, then in '87, the 66 Series came in. I worked with that series up until I left the sheriff's office, as far as a police officer goes.

After I left the sheriff's office, then I

maintained machines for private industry. I also work with Florida International University with Dr. Rose (phonetic), they have a federal grant to work on experimentation with the intoxalyzer. I don't know what the grant is for, I just maintain the machine.

I've written articles involving the intoxalyzer. I've done various experiments; blood and breath correlations, either with the police department or since I've been in private practice. I do maintenance several times a month on machines owned by private law firms. I do seminars. I work with others in the field of breath testing. And that's really kind of it in a nut shell, I guess.

Q. When did you leave the sheriff's office?

A. July of 1990.

Q. And why did you leave the sheriff's office?

A. To go into private practice.

Q. What was your position at the time you left the sheriff's office?

A. I was a deputy sheriff with the Traffic Homicide Unit?,

Q. What kinds of articles have you written on the intoxalyzer?

A. Well, ones I've written myself involved, basically, the Slope Detector.

Q. What's that?

A. That's a mouth alcohol detector that's on the machine and, also, just the basic operation of the machine. That's what the articles dealt with. I've also done various amounts of research and given that to either Dave Fries (phonetic), or Dr. Jensen in classes and training; in other words, a lot of the people who write articles on intoxalyzer, Wayne Morris is one out of Orlando, basically, what happens, they ask me, or they ask others, to do certain parts of the machine, I do that, send them the test cards, then they incorporate it in their article, so I just do a small amount of testing on the machine and then that goes to them for their incorporation in articles, if they wish.

Q. Tell me about your educational background.

A. Well, besides police training, I was a breath test operator in the state of Florida from 1985 until 1994; my certification was good during that period. I had the initial 40 hours of intoxalyzer that the State required.

Q. When was that?

A. That was either '85 or '86, I don't recall. I was certified in '85 on the 4011 and the 900 Series, but I don't require -- don't recall when the first

requirement for the intoxalyzer was. We, actually, were using the machine before we had certification, because the State was in the process of adopting it at that time.

Q. So you were permitted to use the machine?

A. Well, I don't recall if we were using it in criminal prosecutions, but we were using the machine as an experimentation. We were giving people two different samples. And I don't recall if the State was using it at that time. I don't recall.

I have -- I took all the required recalls. I took a maintenance course; although, at that time, in 1985, maintenance was not a specific course, they gave you that and if you were a breath tech., you were allowed to do maintenance. In other words, anybody who had a card could do maintenance, you didn't have to have a specific card, which I understand now they do. And that course was put on, I believe, by the factory representative. I visited the factory when it was in Colorado.

I have a bachelor's degree in Criminal Justice. I have a Master's of Science Degree --

Q. Where did you go to school?

A. I finished my bachelor's at Saint Thomas University in Miami. I completed my Master's Degree

in Science, which is technology and engineering, at the University of Miami.

Q. What kind of technology and engineering is that?

A. It's a course, a two years course, that deals with the technological aspects of engineering and also industrial engineering, mainly statistical analysis and those types of things, which is what I do.

Q. Is that the Slope Detector?

A. No, not specifically. There are no classes for breath testing --

Q. Right.

A. -- except what the State gives, but you take classes that you can use to help you, like statistical analysis, like when you do the intoxalyzer, you can learn about out of a thousand breath tests, how many are going to be this. You work on certain aspects. And that's, basically, what I took that for, plus it gives you some kind of analytical background in different types of engineering is what it's for.

Q. You've been listed as a defense witness in this case, State versus John Chester King.

A. Right.

Q. Have you had a chance to review the file?

A. Yes.

Q. And what, if any, involvement would you have in this case?

A. Well, I would assume, the defense attorney hasn't asked me specifically, but I assume I am going to be dealing with the breath card, if I am permitted and I'll also be dealing with the video, if I am permitted, as far as what I saw and didn't see.

Q. Tell me about the breath card and the breath test.

A. I was given discovery on the case of John King. And I noted that a breath card from machine 2261 had indicated that two tests were given to Mr. King on September 1st, of '98. One test indicated interference subtracted and a second test did not indicate interference subtracted, I assume that's what my testimony will be related to.

Q. Tell me about interference subtracted, what do you now about that? What does that mean?

A. What it means is, is that primarily some chemical, could be acetone, could be toluene, could be acetaldehyde -- I can't spell those by the way -- was placed in the chamber or into the machine by the subject during the test period. Those chemicals are on the same wavelength as alcohol or ethanol. And the

machine detected it during the first blow and the machine indicated that whatever the interferent was that it was subtracted. It was not present on the second blow, which cannot be the case, can't happen. So either the machine was wrong the first time or there was something internally wrong with the machine, possibly that the machine picked up a chemical in the room. In other words, I noticed when I walked in your office today, I could smell paint, fresh paint, if you had the intoxalyzer in a room smaller than this, if it was in a room like this and paint fumes were present, you might also get the same reading, but you would get it, of course, during the air blank phase because the machine would be sucking an interferent.

Q. What's usually the interferent?

A. It's hard to say. Usually, the interferent is toluene, which painters sometimes have that in their system because they breath paint fumes all day, that usual is an interferent, or acetone, someone who is diabetic.

Although, the old machines, the 4011 Series, which basically used the same premiss as the 5,000 Series to give a test result, when an interferent; such as, acetone would be present, a red light came on. It was our policies, at that time, that if an

Q. What does it mean, the instrument is out of adjustment?

A. To me, it would mean it's out of calibration. I mean, that doesn't mean -- I am only talking about the calibration of the machine, not anything else. So, out of adjustment could mean -- to other people it could mean, such as, the direct voltage could be out of adjustment, it could be that LAU display is out of adjustment, the date and time are out of adjustment. It could be a variety of things. It doesn't necessarily mean the machine is not working. It just could mean that it's reading different times and dates.

Q. And now back to the interference subtracted, is the instrument designed to subtract interference?

A. Yes, it is. Although, let me rephrase that, the machine is designed to subtract that, we don't know if it does subtract it, because the way the State does the testing.

Q. What do you mean by that?

A. What I mean by that, this is a good example, during the monthly maintenance -- I shouldn't say your operators, but the maintenance operators of the police department are told by FDLE they use an ethanol free sample, so anyone who has any math background knows

when you subtract zero from zero, you always get zero. We don't know that this machines subtracts from alcohol base, we don't know that. We know it subtracts from zero. The State changed their testing procedures a year or two ago and decided go with an alcohol free sample, so we know it subtracts from zero. We don't know if it subtracts from alcohol or not. In other words, assuming that there was an interferent present in this person's breath and assuming there was alcohol present, we don't know if it subtracted properly or not, because we only subtracted alcohol free samples. Now, don't ask me why they do that, because they never did that until, I guess, a year or year and a half ago, but before that, they always did it properly and I don't know why they changed it.

Q. You disagree with that procedure?

A. Of course, because, obviously, zero from zero -- they're going to get the same result every time. They know before they do this test what the result is going to be. And I am assuming that most people that are brought in for DUI have alcohol in their system, so why would you not subtract from an alcohol sample rather than a zero sample? If you are bringing in people all the time that are not impaired,

been asked to testify. I don't expect I will be, at this point. I can do it if I need to.

Q. Let me give you some information. What would you need? What information would you need in order to plug into your formula?

A. Well, to used the formula I'd like to know the person's weight.

Q. Let's say, 145 pounds.

A. I'd like to know the time he started and stopped drinking.

Q. Let's say, the first drink is six or 6:30, last drink, 9 p.m.

A. I'd also like to know what he was drinking.

Q. Beer.

A. I assume 12-ounce beers or do you have a certain type of beer?

Q. I don't think I know specifics. No.

A. He's a male I take it.

Q. White male.

A. Now the question is -- what is your question? I mean, that information I have, do you want to know --

Q. Well --

A. And how many drinks did he have? Or do you want me to go by the reading backwards?

Q. He had -- let's say he had three or four or five drinks. This is what --

A. How about four, we'll round it off.

Q. Is that what you would do?

A. I would round it off. Unless you want me to give you a low and a high figure?

Q. Do the low and the high. Give him the benefit of the doubt and then go the other way.

A. You want to know -- now, what else is the question?

Q. Well, you said you can do the burn-off rate and you can also tell what this person would have blown. What do you generally use this theory for or this formula for?

A. I can tell you what I normally would do. I understand, from you, that at 6:30 he began drinking and by 9 o'clock he was completed his drinking. So, normally, the question would be either he had three drinks or five drinks between that period of time, which is two and a half hours. He blew at 11:25. So I don't know when he was driving. Normally, the question that you would ask that would be what time was he arrested, do you recall?

Q. I can tell you. 10:30.

A. 10:30 he was arrested. So, normally, the

question would be that I get would be, well, what was he at 10:30; in other words, what would he be at 10:30 --

Q. Okay.

A. -- and then whatever that number would be, obviously, you know, where he was according to the card at 11:30 --

Q. Which is when he was on video.

A. So whatever you want to ask on that.

Q. Let's start at what would he have been at 10:30.

A. Okay.

Q. When you are done just explain what you did.

A. Okay. Basically, what I did is just used the normal -- I used the Widmark Formula, which accounts for one pound is 454 grams, which is pretty simple. Then I used the fact that each number of drinks you gave me I considered one ounce of alcohol. And I just used .40 alcohol, which is the proof and what I did was I anticipated that from 6:30 to nine, that he consumed three drinks. His maximum blood alcohol level; in other words, if he consumed the drinks during that period, the maximum he would have been is about a .075, although, that's a little high because he would have had a little bit of a burn-off

rate. I am assuming he had just a small amount of food during that time, like, pretzels or chips, although -- that's what I am assuming. At 10:30, when he was driving, he would be approximately at .040, that would be about an hour and a half after his last drink.

Q. .040?

A. Right.

Q. How did you come to that number?

A. Again, that's using the elimination rate of .015 percent. I also anticipated that he had his last drink right up until nine, it's going to take 30 minutes to absorb and another hour to get into his system, so it's not going to be a lot of burn off at that time.

Now, using five drinks, assuming he had five drinks during that period of time, his BAC would be approximately .125 and then using the same information, at the time of driving or at the time of the stop, which is 10:30, he would be a .101, roughly.

Q. At 10:30 he would have been?

A. .101, at the five drink scenario. He would have been over the limit on both occasions.

Q. Okay. What would he have been -- what time was the video, 11:30?

A. The video was 11:21 was the video.

Q. What would he have been there?

A. Assuming -- obviously, he would still be going down, on the three drink scenario, he'd be a .025. And on the second scenario, five drinks, he would be approximately .086.

Q. .086?

A. Right.

Q. Let's talk about how many drinks would this person have to consume in and hour sitting down to get to a .18?

A. In an hour, probably eight or nine, I suppose, at least.

Q. How about in two hours?

A. Probably about seven to eight. It's not going to have that much burn off.

Q. Without burning off anything?

A. Right. He's going to have very little burn off in that time.

Q. What about if this person is an alcoholic, does that factor in?

A. That's not really going to affect the blood alcohol level. It may affect how he looks; in other words, he may be able to not show as many signs of impairment if he's what is called a "seasoned drinker"

as someone else.

Q. Any other ways that this person would be affected if they are an alcoholic?

A. Well, I don't understand what you mean by affected.

Q. Say this person, you know, has been drinking a certain amount everyday for however many years, would it take them more or less alcohol? Would it affect the breath reading at all?

A. It wouldn't affect the breath reading at all, but it would affect their performance. In other words, you probably, with your weight, would not be able to carry eight or nine drinks and be able to function as you are now. A "seasoned drinker" may be able to function better. You would still see certain signs of impairment, but he would be able to certainly function, probably talk, make some decisions, shows those types of things.

Q. What types of impairment would you still see?

A. Bloodshot-watery eyes, probably their movement, thick tongue; a lot of times their speech is still affected, movements; walking in some cases would be affected, obviously, breath; you would smell the odor on the breath, those types of things you would

still see.

Q. What else would you be testifying to in this case? Have you reviewed the maintenance documents?

A. No, but if -- I believe Fogelman (phonetic) did them?

Q. I believe so.

A. If he did them, he does a very good job. I have no problem with him. I know he follows the rules.

MRS. WEISS: Do you have a copy?

MR. JAROLEM: I brought over a copy, the one that was faxed over to me.

THE WITNESS: I, generally, have no problem with his maintenance procedures.

MRS. WEISS: You need to make a copy. I don't know what they did with my copy.

THE WITNESS: I probably would ask to see who the -- I can't read the signature of the inspector, the State inspector.

BY MRS. WEISS:

Q. What, else?

A. The only other thing -- the only other thing I'd probably testify about, I think I told you, the procedure they use on the acetone check.

Q. You don't agree with those procedures?

A. No. I think I told you why I don't agree with them, but, obviously, that's not the rules, I don't make the rules. I am just telling you what I would do. That's it, as far as I know, unless he has something else he wants me to testify about.

Q. Have you discussed the field sobriety exercises at all with Mr. Jarolem?

A. No.

Q. Have you had a chance to review these field sobriety exercises?

A. No.

MRS. WEISS: Is there something that --

MR. JAROLEM: I don't anticipate having him testify on field sobriety.

BY MRS. WEISS:

Q. Back to this interference subtracted and then that's really all the questions I am going to have.

A. Okay.

Q. Are you saying here today that since it was detected and it printed up on the breath card on the first reading that the second one has to be invalid?

A. Yes, because without knowing what caused the interferent the answer to that would be yes. In other words -- I gave you one example already, but

assuming -- let's assume for a minute that the intoxalyzer has, as you are aware of, a list of warnings that let the operator know, this was a warning that let the operator know that something unusual occurred. It would be the same thing as if I plugged the machine in here for you now and we got a radio frequency interference on the first test, the question would be, where did it come from? Maybe I'll find out you were on the phone at the time or you were on a car phone or something unusual occurred during that time, at least I have to know what it is before I give a subsequent test.

In this case it's very simple, the operator was advised there was an interferent and the machine told them it subtracted it, now, the question is, what interferent is it? Where did it come from? Did the guy put something in his mouth? Was there something unusual that happened? Now, you have to recycle, wait the 20 minutes, either take him to the hospital, take a blood sample or do another test, because the machine warned him something was wrong. We don't know what the interferent was, but it can't occur on one test and not the other. It can't do it. Something happened. I can't tell you, obviously, what it was, but something happened. And anyone that would tell

you that it can happen on the first test and it's okay on the second, obviously, has no idea what's going on with this machine. It can't happen that way. You can't have something in your lungs the first breath and not be there on the second breath, because, as you recall, that's why they wanted to do a deep-lung sample. It just can't disappear miraculously.

Q. It couldn't just mean that it gave a valid sample?

A. If you're asking me if the second sample is okay, that's probably a -- it can be answered either way, yes or no. In other words, is the second sample valid according to the machine, yes, it is, but the state of Florida requires two valid samples, that's what it requires. We don't know what happened on the first sample and that's why -- it would be very simple. All the operator had to have done is stuck another card in there and run two more test samples to see, well, what was it that caused an interferent? I'd want to know.

They would look pretty stupid if this guy would have keeled over and dropped dead 20 minutes later. That's what can happen if you have a high acetone read. I don't have any idea if this guy is a diabetic or not, I can't tell you, but they would look