

FORMAL REVIEW HEARING
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
DIVISION OF DRIVER LICENSES
BUREAU OF ADMINISTRATIVE REVIEWS
EDWARD MACKIE, JR.
JULY 10, 2001

Hearing

Officer (H.O.): This is a formal review held in accordance with chapter 158-6 Florida Administration Code § 322.615 of the Florida Statutes. This review concerns the suspension of the driving privilege of Edward Gordon Mackie on June the 2nd of the year 2001, for refusing to submit to a breath urine or blood test. His driver license number is M-200-227-72-121-0. The scope of this review shall be limited to these following issues: Where the law enforcement officer had probable cause to believe Mr. Mackie was driving or in actual physical control of a motor vehicle in this State while under the influence of alcoholic beverages or controlled substance. Whether he was placed under lawful arrest under violation of statute 316.193 and whether Mr. Mackie refused to submit to such a test after being requested to do so by a law enforcement or correctional officer. Whether Mr. Mackie was told that if he refused to submit to such a test, his privilege to operate a motor vehicle would be suspended for period of 20 years when the case of a second refusal, for a period of 18 months. Is the alleged driver present?

MACKIE: Yes ma'am.

H.O.: Would you state your name and address for the record....

LIDA: Carl Lida, 8750 W. Brow....

H.O.: You're not the alleged driver...

LIDA: Oh, the alleged driver, sorry

MACKIE: Edward Gordon Mackie, Jr., 9311 Orange Grove Drive, # 117,
Ft. Lauderdale, Florida, 33311.

H.O.: Now then, Counsel, your name and address.

LIDA: Carl Lida, 8751 W. Broward Blvd., Suite 305, Plantation,
Florida

H.O.: 33322?

LIDA: 33325

LIDA: 24

MACKIE: 33024

LIDA: Yours is 33024 and mine is 33324

H.O.: Okay. 8751 W. Broward Blvd., Suite 305, Plantation, Florida
33324

LIDA: Yes ma'am.

H.O.: All right. Counsel, have you excused any witnesses prior to
this review?

LIDA: No ma'am.

H.O.: All right. You have the subpoenas, but they were not served. It
that correct?

LIDA: Yes ma'am, that's correct.

H.O.: Okay, and we do have witnesses present today. Would you
mind stating your names?

LIDA: This is...

SWOPE: My name is Rick Swope, S-W-O-P-E.

LIDA: and Mr. Mackie. And the other person present is Christina....

KONTOGIANNIS: Kontogiannis

LIDA: Kontogiannis, is working for my office....

H.O. Oh...

LIDA: That's what I say everytime. I say the same thing everytime.

H.O.: How do you spell your last name?

CK: K-O-N-

HO: K-O-N

CK: T-O

HO: T-O

CK: G-I

HO: G-I

CK: A-N-N-I-S

LIDA: A nice Irish girl.

H.O. Yes, you call her Miss Christina K? Right?

LIDA: Right, that's right.

H.O. Counsel, before we start taking testimony, let me go ahead and enter the documents for the record. There's a photostatic copy of a Florida D.U.I. Uniform Traffic Citation, I'm reading 7875-75-X, it is a notice of suspension for refusing to submit to breath, urine, and blood test coming under DDL 1. Coming under DDL 2 is a Florida Driver's License picture of the driver. Coming under DDL 3 is a photostatic copy of the Probable Cause Affidavit, signed by the arresting officer, Thrift, and attested to in the 3rd of June, the year 2001, and it consists of 3 pages. Coming under DDL 4, photostatic copy Arrest Information Sheet, consists of one page, coming under DDL 5 is a photostatic copy of the Refusal Affidavit and has been signed and attested to, also there is a photostatic copy of the back of it, Counsel. Coming under DDL 6, is a photostatic copy of the Intoxilyzer Breath card, and there are one, two, three, four, photostatic copies of Intoxilyzer Breath cards all with different times, 23:25, 23:31, 23:39, 23:44, 23:47, and 12:17. Coming under DDL 7, a photostatic copy of the DUI

Alcohol Influence report, has been signed and attested to. Coming under DDL 8, photostatic copy of the monthly inspection intoxilyzer 66-005068, dated May the 15th June the 27th, at a yearly inspection intoxilyzer, and all 3 documents say the instrument does comply with the FDLE Rules. Coming under DDL 9, a photostatic copy of the property inventory receipt, coming under DDL 10, a photostatic copy of the Florida Driver's License. Coming under DDL 11 are one, two, photostatic copies of citations, Citation 3030-AWP, citation issued for not using designated lane. Right turn from left turn lane, and Citation number 787575-X citation issued for refusing to submit to lawful breath and blood test and coming DDL 12 is a photostatic copy of Offense Report and it consists of 2 pages. Counsel, I finally got the documents entered into the record. Did you yourself, sir, have an opportunity to review them?

LIDA:

I have.

H.O.:

Any objections to the documents themselves?

LIDA:

I have no objections to the documents. We do have an objection to DD, what is it? DDL 5. Just as it regards to the testation, I know it says "deputy sheriff" down here, but the person who signed it does not give any type of badge number, ID number, or any other type of identifying number, so we would have no way of knowing whoever signed it, who they were. We can't tell by their signature, their name doesn't appear on any of the other forms. So there's a signature of somebody that says "deputy sheriff", but I don't have a clue who they are, I couldn't subpoena them if I wanted to, because

LIDA con't: ...if...maybe your better than I am, you can tell me who that is, I have no idea.

H.O.: Now you're giving me the hard stuff.

LIDA: Yea, I don't know who that person is. And without a corresponding I.D. or badge number, how would I even know if they were a deputy sheriff?

H.O.: Well, I'm sure, Counsel, that not everybody would write "deputy sheriff" on it.

LIDA: Well, maybe not, but the point is their name doesn't appear on any other of the forms...

H.O.: Well, okay, Counsel,

LIDA: and that's our objection, and we want it noted for the record...

H.O.: All right, all right

LIDA: and whether or not somebody would actually write "deputy sheriff" I don't think that's the issue, I think the issue is that the person who to attests to it has to be a deputy sheriff, and just because they write deputy sheriff doesn't make it so. It would seem to me, at the very minimum, they would be required to put some type of badge or ID number, like is on all the other forms, you know, everyone writes their number, so they can be verified who they are. In this particular case, there is no number, there's no way to verify who they are, and even if I attempted to interview everybody at the Broward Sheriff's Office, which is a burden that should not be placed on me as a defense lawyer, how would I know who to ask for to go to them and say is this your signature, which is what the law requires? I'm a notary, you might be a notary, when you notarize

LIDA con't: something, it has your name, and your notary seal on it and the date you expire, so anybody in the world can come to you later on and say, "Did you notarize this?" "Did you see this person?" or whatever the case may be. Our Statute allows deputy sheriffs to notarize things, there's no question about that, but there is the question is 'who this person is?' and I would have no way of knowing. And I think it's a valid argument, I know you all down here don't always...some people don't always accept that argument, but I do think it's a valid argument. I can't, I can't verify it, I can't confront it, I'm denied my right to confrontation on behalf of my client, because I have no way of subpoenaing that person to this hearing.

H.O.: Counsel, looking at the probable cause,

LIDA: Yes, ma'am

H.O.: it looks like the same signature with the batch number there.

LIDA: Could be. But I have no idea.

H.O.: I don't either, but it's close enough, Counsel.

LIDA: All right, thank you.

H.O.: Any other at this time, counsel?

LIDA: Well, it's not objections to the tapes or the cards, it's just our argument in reference to the tapes and the cards....

H.O.: Right

LIDA: and we have Mr. Swope here to testify and we can make our argument if you want to hear from Mr. Swope, he's here.

H.O. Let me go ahead and place him under oath. If you mind raising your right hand, sir. Do you solemnly swear or affirm that all

H.O. cont: the testimony your about to give in this case is the truth and the whole truth.

SWOPE: I do.

H.O. Thank you. For the record can you state your name.

SWOPE: Rick Swope. S-W-O-P-E.

H.O. And your address, sir.

SWOPE: uh, 8211 SW 28th Street, in Davie, Florida 33328.

H.O. And what is he?

LIDA: he's an expert witness in regards to the intoxilizer machine and the card read out in this case.

H.O.: Okay

LIDA: Um..

H.O.: Uh.

LIDA: You want me to question?

H.O.: Yep, go ahead, Counsel.

LIDA: You wanted to ask something?

H.O.: No, I just wondered why you would have someone from outside the area, the Broward Sheriff's Office.

LIDA: (laughs) We were looking for an independent view.

H.O.: (laughs)

LIDA: We were looking for an independent view.

H.O.: I ask and you tell.

LIDA: Mr. Swope, please tell the hearing officer what your qualifications are in regard to the Intoxilizer 5000.

SWOPE: This model is a 5000R, I was a police officer for over 15 years, I've taught over 4,000 police officers in field sobriety exercises and breath testing, certified by the Criminal Justice Institute for

SWOPE
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the State of Florida since 1984, I was a police officer from 1974 to 1990, the last six years I was with the Broward County Sheriff's Office. I was the administrative coordinator for the DUI Task Force and Traffic Homicide Units, the Intoxilizer machine used in this case came into the state in 1985 for testing. I worked with that machine from the inception, currently, I work with that machine. I have 2 of my own. I maintain 2 other machines for law firms that own those are different companies. I also work for Florida International University. My job is to work on maintenance on the machine and to maintain it for experiments conducted by students in Ph.D. programs. FIU is also working under federal grant for the federal government testing different devices. I have a bachelor's degree in Criminal Justice from St. Thomas University, I have a Master's of Science Degree in Technology and Engineering University of Miami, I've been working with breath testing machines since 1974 and currently work on them. I'm also certified by the National Highway Traffic Safety Administration. I also attended the course, which was put on by CNI, which is the maker of the Intoxilizer when they were located in Colorado, they since moved to Owensboro, Kentucky. I've written several articles on Intoxilizers; I worked with the only group in the United States that teaches breath testing throughout country. And basically we work on experiments....

LIDA: We would certify Mr. Swope as an expert on the Intoxilizer 5000. We ask you to certify him as an expert.

H.O.: I can't certify him, Counsel.

LIDA: Or accept his testimony as that as an expert.

H.O.: Well, we'll accept his testimony, Counsel.

LIDA: Okay. Have you had a chance, Mr. Swope, to read the breath cards in Mr. Mackie's case? The ones that were entered into the record as DDL 7?

H.O.: I believe they were 6.

LIDA: 6. There's, I believe 3 or 4 test cards, did I send them to you? Are these the ones you examined?

SWOPE: Yes.

LIDA: Alright, have you reviewed them all?

SWOPE: Yes.

LIDA: Alright, do you have an opinion as to whether or not Mr. Mackie refused to take the breath test?

SWOPE: Yes

LIDA: And what is that opinion?

SWOPE: Well, my opinion would be no, not based on the charts. The machine was obviously not working at the time, it's, it's noted on the cards that it's not working correctly. It's just that nobody caught it.

LIDA: What is, what is, what was noteworthy on the cards? For instance, the first card the time is 23:22, and it shows a reading of .172, but it also says "low sample"?

SWOPE: Well, um, looking at the first card, and I don't know if the hearing officer has it....

H.O.: unintelligible

SWOPE: you'll see that the time starts at 23:22, on the card. There are 2 readings on the card, you'll also see an asterisk..um..first of all, there's no such thing as a low volume sample, that the state of Florida software change. In other words, that means it's a deficient sample, meaning that one of three things was not satisfied on the machine. Whether it be time, pressure or slope. But basically the main indicator on this would be the card time, itself. Um, each test can go no longer than 3 minutes, meaning that, in other words, if you take a sample, the machine then processes that sample, then purges the air chamber. Now, what happens is if the machine just sits there, for 3 minutes, or over 3 full minute period of time, the machine will kick out the card. So either there's a clock problem with the machine, which it directly affects the reading itself on the machine, meaning that it does not analyze properly what's going into the sample chamber and does not capture, meaning that, if you look at the card again, uh, you have the first air blank at 23:22, then 3 minutes later you have a low volume sample at .171, then the machine goes into an air blank mode and then there's a 4 minute processing time between the times. So if you look at that, by itself, let's just assume that well at 23:26 when it did the air blank it would say 1 23.26 and .56, meaning its close to rolling over to another minute. So you have that problem right there that you have to look at, initially because it shouldn't take that long for an air blank. And the second...

LIDA: Let me ask you a question,

SWOPE: yes

LIDA: on the first part, is there anything to indicate that Mr. Mackie did not try to take the breath test?

SWOPE: No, he actually, actually the samples, there had to be breath administered in the chamber at some point or the other. But again, that comes into play when you look at card #2...

LIDA: okay, let's look at card #2

H.O.: Let me ask you this, Mr. Swope, does it necessarily have a 3-minute period?

SWOPE: Oh yes, every machine, according to State Rules, there has to be a 3 minute period.

H.O.: But if it takes longer to read one out, could it be over 3-minute period then?

SWOPE: If there's something wrong with the software, absolutely.

H.O.: Or if there's something that it, its picking up? Would that be (air) too?

SWOPE: If it's picking up like radio frequency interference...

H.O.: No, I mean something in the chamber.

SWOPE: No, it should not, no.

LIDA: Can I ask if they had, with your permission? Go to the card that says 'breath alcohol, mouth alcohol'

SWOPE: Okay

LIDA: What time is that card?

SWOPE: That's 23:47.

LIDA: So that, now allegedly Mr. Mackie had been in police custody the whole time he had been arrested, correct?

SWOPE: Yes.

LIDA: And the Administrative Rules require that the police officers watch him so he doesn't have any mouth alcohol in this mouth, correct?

SWOPE: That's correct. And the card indicates he was observed by the breath tech operator at 2300 hours, which would be 20, 25 minutes before the first result.

LIDA: So the first result, he blows in the machine, your testimony is the machine malfunctions, and gives an invalid reading, correct?

SWOPE: Yes, or did not read correctly.

LIDA: Or did not read correctly. Second, then he takes the test again?

SWOPE: Correct. Yes, well, he had to, because it wouldn't have, it would have shown triple zeros, in other words, if he had refused to blow,

LIDA: Right.

SWOPE: it would show triple zeros.

LIDA: Okay. So now he takes it a second time.

SWOPE: Right.

LIDA: And again the card indicates there's some difficulty with the sample, of some sort.

SWOPE: Correct.

LIDA: Is that a fair characterization?

SWOPE: Yes

LIDA: Same type of problem, its not reading properly or its not analyzing properly, whatever the technical jargon is?

SWOPE: Correct.

LIDA: Now, he attempts a third test, in sequence, right? The third one would be the one that now says, "mouth alcohol". How would

LIDA con't: we account for Mr. Mackie having any mouth alcohol if he's been under the constant observation of the police department since the time he was arrested? Or into the BAT facility?

SWOPE: The machine's reading incorrectly.

LIDA: Incorrectly.

SWOPE: Absolutely, there's no question.

LIDA: So, your opinion would be that he attempted to take the test, and the machine has malfunctioned on three occasions.

SWOPE: Well that's correct, but the cards basically backs that. Obviously he took the test because there wouldn't be these readings, and the police, and I know, because I wrote half the program at the Sheriff's Office, and when that was initially put into place, the 20 minute observation period was a secondary check, which the officers will tell you at that time.

LIDA: Right.

SWOPE: The reason we watch them for 20 minutes is that in the event they don't take anything in their mouth. So technically, he's being watched by the officer who administered the test, they should, there might be mouth alcohol before in case he tried to sneak something into his mouth,

LIDA: Right

SWOPE: but not, the mouth alcohol reading comes actually 47 minutes after he's being observed. So for 47 minutes, he's been trying to blow into this machine and been getting low sample volumes, with the exception of one, and this is where again, shows there's a problem with the machine. If he takes the 3 readings that we get that are low volumes before, there's 3

SWOPE

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before we get to what the State would consider as a proper reading, in other words, I think the Hearing Officer would see that the 4th reading is a .144, which the officer indicates as a valid, in other words, that's valid. So if we take down on it's face, and just say it's a valid reading, we know then that he blew longer and he blew for the full time period for the machine to accept the sample. Well how could that reading be lower than a low volume sample which indicates that there's a lower, its not, the sample is not in the chamber long enough or hard enough, because remember, we're trying for deep lung air, how could those readings be higher than the true value of the reading if you believe that the .144 is correct?

LIDA:

But they invalidated the 144, the test operators, right? They didn't consider it a valid reading, because they asked him to take another test?

SWOPE:

Well because, they asked him to take another test, because they wanted to get 2, I'm sure, that did not indicate low volume samples. So now when they took reading number 5, they got mouth alcohol.

LIDA:

So that would invalidate the prior results.

SWOPE:

Exactly and that indicates clearly, and I've seen it like 6 or 7 times on machines in the past couple of years. And it doesn't happen very often, and I guess the best way, the easiest way, not to, uh, not trying to give you some bad examples to the Hearing Officer, but, uh, if you ever typed on your computer and it locks up on you. Well, obviously, your machines not

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broke, but your software's just clamped down on it and the only way for you to get out of that program is to either shut the machine down and re-boot. Your machines not broke, but when it reboots it kinda of, it kinda of reloads everything and now your back in service. And the same thing with theses Intoxilizers, it happens very rarely, it doesn't happen often because these, you know, I'm not here to tell you it's a bad machine

H.O.:

Right

SWOPE:

They actually are very good machines, they work good. But when they don't work, then the problem, this is what you get right here on this card, you have people who blow, and I've had one that, I had a case on, that the guy blew 13 times. 13 times, he had 13 readings, and never had one that they could get proper. And, but that one was on video, so we kind of lucked out on that.

LIDA:

Right, they don't video the blowing in Broward County, they video everything else but not the actual blowing.

SWOPE:

It doesn't happen very often, it's just, and how, how the machine would pass inspection would be that once the operator is finished with the defendant, would be that if they shut the machine off or they hit the re-set button in the back, there's a re-set button, then the machine would probably be fine. I would think it would probably be fine, because we had that happen with ours.

LIDA: Do you have an opinion under these circumstances whether or not Mr. Mackie would be considered to have refused to take a test?

SWOPE: Well, I don't see after this many readings and the mouth alcohol, I mean obviously, I guess the question would be more to the Hearing Officer would be, how many times are you required to blow? And I think he blew..

LIDA: at least 3

SWOPE: sufficiently, well no, he blew one, two, three, four, five, he blew on five occasions because remember that the invalid sample on the mouth alcohol, he still blew.

LIDA: Right.

SWOPE: So the machine then was telling the operator, well then look, he had has alcohol in his mouth, and I'm sure, I'm certain the officer didn't give him anything to drink.

LIDA: (laughs) Well, we hope not.

H.O.: What would cause that? Mouth alcohol?

SWOPE: Mouth alcohol would be caused by if he had an object in his mouth that he was holding in his mouth, such as tobacco, there was some of those tobacco bags people have, we have tested those and if they had alcohol in them, they hold it. Dentures, but then again, I would say on the first blow, that's where you would see that, but because we do have, remember, we do not have an invalid blows before blow #5, in fact, blow #4 is, if we just look at blow #4, that would be a proper blow. There's no asterisk, the machine accepted the blow. So where did the mouth alcohol come? Well, it had to either come from, the

SWOPE

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only other way it could come from, Mr. Mackie throwing up, and then blowing, which, I didn't see that in the report, or he put something in his mouth with an alcoholic nature between the forth test and the fifth test.

LIDA:

Or the machine was invalid and malfunctioned.

SWOPE:

Well right, but I'm obviously I don't believe he took anything into his mouth. But that would be the only thing that caused it.

H.O.:

You've been around this area when they are giving the breath test, is that correct?

SWOPE:

Sure.

H.O.:

On the, are people still handcuffed when they're giving the breath test?

SWOPE:

Normally, no.

H.O.:

Normally, no?

SWOPE:

Normally, no. Not unless they have a violent subject that obviously that's trying to (unintelligible) they keep in handcuffs, but normally, no.

H.O.:

Okay.

SWOPE:

But the officer is, that's their job to watch them, to be observant, and I think the officer in this case said they watched, well S. Gray was the operating.

H.O.:

Could he have burped or anything at that time, silently and caused mouth alcohol when he went to give a read?

SWOPE:

It's hard saying, is it possible to get a reading on that?

H.O.:

uh-hu

SWOPE: Um, I would say if he burped right before the test that would be correct. It could happen. But your talking about 30 to.....I guess if the 5th test was started at 23:46, and he blew at 23:47, so he would have to go with he burped somewhere within that minute period or two.

H.O.: But it could have been possible.

SWOPE: Well, it's a possibility, sure.

LIDA: The most likely reasonable explanation for this, in your opinion, is that the machine was malfunctioning? Is that correct?

SWOPE: That's correct and, and again, we have 4 blows into the machine for the mouth alcohol so

LIDA: okay

SWOPE: Obviously the software just wasn't kicking in at that time correctly. Which I said, it happens very few times, but it does happen.

LIDA: I have no further questions, Mr. Swope.

H.O.: I don't think I do.

SWOPE: Thank you, ma'am.

H.O.: Thank you, sir. Um, counsel, did you wish your client to give testimony.

LIDA: Yes, just briefly. Just on one issue.

H.O.: Okay. Let me place him under oath. Would you mind raising your right hand, sir. Do you solemnly swear or affirm that all the testimony you're about to give on this case is the truth and whole truth?

MACKLE: Yes.

H.O.: Would you tell me your name for the record.

MACKIE: Edward Gordon Mackie, Jr.

H.O.: Okay, counsel?

LIDA: Mr. Mackie, did you attempt to blow into the machine as directed each and every time you were directed to?

MACKIE: Yes.

LIDA: Did you blow as hard as you could?

MACKIE: Yes.

LIDA: Did you put any alcoholic substance in your mouth between the tests?

MACKIE: No.

LIDA: Did you have mouthwash, or alcoholic beverage?

MACKIE: No.

LIDA: Were you always under the observation of the police?

MACKIE: Yes.

LIDA: On the last card that said you refused, did you refuse? What happened?

MACKIE: They said I didn't get a reading, which meant I refused.

LIDA: Okay. And so they just told you you refused?

MACKIE: Yes.

LIDA: And that was the end of your session with the machine?

MACKIE: That was it.

LIDA: Did you refuse? Were you prepared to give a breath sample to them at their request?

MACKIE: Yes. Yes.

LIDA: Did you try hard to give them a breath sample?

MACKIE: I tried many times to give one.

LIDA: Okay. Were you accepted for employment by United States Customs?

MACKIE: Yes.

LIDA: Did you apply to United States Customs?

MACKIE: Yes.

LIDA: Had they offered you a job in Customs service?

MACKIE: Yes.

LIDA: I bring that out to you, your Honor, just for a little creditability check here.

H.O.: Well, I realize that, Counsel, but it's really not in the scope of our hearing here.

LIDA: I have no further questions for Mr. Mackie.

H.O.: Okay, Mr. Mackie let me ask you this. After you, they said that they had gotten an invalid sample, did they ask you to blow again?

MACKIE: Which one was the invalid sample?

H.O.: Well, how many, do you remember if she asked you she said "we're not getting a valid reading we need another reading?"

MACKIE: She said that a couple of times.

H.O.: A couple of times. Did you ever at any other time before you left the facility and was transported to the Main Jail say, "hey, let me try this breath test again"?

MACKIE: No

H.O.: Counsel?

LIDA: I have nothing further, I just object to that last question. I don't think the burden is on him to request the test.

H.O.: Well, it doesn't matter, you know,

LIDA: Okay.

H.O.: You know, since he did it so many times

LIDA: He sure did, Judge.

H.O.: Uh, you know, why didn't he try this again?

LIDA: Well that's our point. That he did it so many times.

H.O.: Let me ask you this, Counsel, had, did you wish to continue this case in order to maybe have the breath technician here?

LIDA: Well, it's my understanding of the rules, and perhaps I don't understand the rules...

H.O.: unintelligible

LIDA: my, my, well you're the judge so uh, it's what you want that's important. But my understanding is that if the officer isn't here to testify then the report is submitted and you can judge what he wrote on the report versus the testimony that we presented today. I assume if the technician was here today, his testimony or her testimony would be similar to what's written on the report. There's nothing on the report that indicates that he put anything into his mouth to account for...

H.O.: No.

LIDA: mouth alcohol, there's nothing on the report that in our view, would refute the expert testimony that we've presented, based on these cards there was obviously a problem with the machine. Now, the technician isn't probably not certified to testify about the machine and the operation of the machine

H.O.: No, that would be Mr. Zaeger.

LIDA: Right, that would be Mr. Zaeger who wasn't present, so, the problem with Mr. Zaeger being here, is as Mr. Swope has

LIDA con't:

testified, once that machine is shut down and restarted, or the reset button is hit, then the machine will reboot itself and the problem will disappear. So, Zaeger wasn't there to see what occurred, this operator would not have an argue the certifications to testify as if the machine was having problems. He made whatever observations he made. We think, we refuted them with expert testimony concerning the cards themselves and the story that the cards tell. The cards tell a completely different story then somebody whose trying to refuse. And the one card that seems to be, what's the right word, the flaming gun, the flaming sword, is the breath alcohol card. I mean, there's no reasonable explanation to have a card that says "mouth alcohol" when they were under constant supervision of the police. Obviously, he didn't put anything into his mouth. He testified that he didn't put anything into his mouth. The reports don't indicate that he put anything into his mouth. And the only valid explanation for that is that the machine malfunctioned, which is consistent with all the other cards that the machine has given. So, we didn't subpoena the technician because we didn't think the technician could add anything of a subsident nature to this discussion. And I do think the standard is reasonable doubt in regard to Mr. Mackie, and I think he's entitled to the doubt under these circumstances. I mean it's clear there was some problem with the machine that night and the mouth alcohol card kind of highlights that, for me, in any regard, along with Mr. Swope's testimony. And I don't think there's a more qualified expert in South Florida than Mr.

LIDA con't: Swope. There may be people that are just as qualified, but I don't think there's anybody more qualified than Mr. Swope. Because he's had experience with these machines and this company for over 20 years so this is unusual, but it happens, I think it happened to Mr. Mackie and I think he's entitled to the benefit of the doubt. I think we've made a case of reasonable, as they say reasonable doubt. That's what we've tried to do here is make a case that there was certainly a doubt, and he did clearly blow 5 times. How many times does he have to do it? Unfortunately the regulation is silent on that, I don't know of any case that deals with the issue of how many blows constitute a good faith effort. (Unintelligible) a reasonable number, but you know...

H.O.: I guess if they don't have anybody behind them, they can do as many as they need, right? I don't know.

LIDA: Well, his testimony was he continued to try to blow

H.O.: Right

LIDA: and they finally said, "Well you refused". So we think we made our case and our point and we had no need to subpoena the technician.

H.O.: So Counsel, you have no other evidence that I am getting the drift you want a motion to invalidate because the instrument malfunctioned.

LIDA: That he, in act, did not refuse. That he did take it. The basis of this suspension is not that he blew over the legal limit, the basis of this suspension is that he allegedly refused, and we think he