

State of Florida)
County of Broward) :ss

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

STATE OF FLORIDA,
Plaintiff,
vs.
JAMES MARCELLO,
Defendant.

Case No. 88-1692

STATE ATTORNEY
17TH JUDICIAL
CIRCUIT OF FLORIDA

1992 JUL 27 AM 15

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Fort Lauderdale, Florida

July 27th, 1992

2:00 o'clock p.m.

DEPOSITION
OF
RICK SWOPE

APPEARANCES:

MARTIN P. MCDONNELL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida.

DOUGLAS BRAWLEY, Esquire,
Assistant Public Defender,
Appearing on behalf of the Defendant.

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I-N-D-E-X

Witness

Rick Swope

Direct Examination

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By Mr. McDonnell

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By Mr. Brawley

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Deposition of RICK SWOPE, a witness herein,
taken on behalf of the State herein, for the
purpose of discovery and for use as evidence in
this cause, pending in the Circuit Court of the
Seventeenth Judicial Circuit, in and for Broward
County, Florida, before BETH A. COZZA, a Notary
Public within and for the State of Florida at
Large, pursuant to notice heretofore filed, at the
Broward County State Attorney's Office, 201
Southeast 3rd Street, Room 640, Fort Lauderdale,
Broward County, Florida, on the 27th day of July,
1992, commencing at the hour of 2:00 o'clock p.m.

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Thereupon,

RICK SWOPE,

having been first duly sworn, was examined and
testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. MCDONNELL:

Q. State your full name for the record?

A. Rick Swope, S-w-o-p-e.

Q. Currently employed with?

A. I have my own company. It's under my
name, Rick A. Swope and Associates. Accident
reconstructionist.

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1 Q. What do you do for a living?

2 A. I do primarily accident
3 reconstruction work. I teach out at the Broward
4 Police Academy as an adjunct staff and I also
5 teach around the State and for S.P.I. out of
6 Louisville, Kentucky.

7 Q. What is S.P.I.?

8 A. That's the Southern Police Institute,
9 Louisville, Kentucky. And I do some consulting on
10 DUI matters as well.

11 Q. Have you ever been qualified as an
12 expert in anything in the State of Florida?

13 A. Yes.

14 Q. As an expert in what?

15 A. I've been qualified as an expert in
16 accident reconstruction. I've been qualified as
17 an expert in DUI apprehension and detection in the
18 use of the Intoxilyzer 5000 and 5000R.

19 Q. And approximately how many times have
20 you been qualified in accident reconstruction
21 cases?

22 A. Probably about 36 to 40 now. Maybe
23 more.

24 Q. Have you been qualified since --
25 Well, did you leave the employment of the Broward

1 Sheriff's Office?

2 A. Yes.

3 Q. When was that?

4 A. I went into private practice July
5 26th, 1990.

6 Q. Two years?

7 A. Two years, yeah, exactly.

8 Q. Since that time, have you been
9 qualified as an expert?

10 A. Yes.

11 Q. Approximately how many times?

12 A. Probably most of my qualifications
13 have been in Court. I've been in Court probably
14 about 30 some odd times since I left the
15 department.

16 Q. Are you familiar with the facts of
17 the case of the State of Florida vs. James
18 Marcello?

19 A. Yes.

20 Q. How did you become initially
21 involved?

22 A. I was contacted by Doug Brawley of
23 the Public Defender's Office. He advised me that
24 he had a case that he would like me to look at and
25 read and give him my opinion of the facts of the

1 case.

2 Q. As a traffic homicide investigator or
3 as an accident reconstructionist?

4 A. Accident reconstructionist.

5 Q. When was that? Do you recall?

6 A. I don't recall the exact date. I
7 believe it was about a year ago. I'm afraid I
8 don't have that date with me.

9 Q. Did you enter into a contract for
10 employment?

11 A. A verbal contract, yes.

12 Q. What are they paying you per hour?

13 A. I get -- At the time the case was
14 initiated, I was charging any governmental agency,
15 whether it be State or Public Defender or County,
16 \$75 per hour. That was a flat rate. Then I would
17 charge mileage and any additional expenses.

18 Since that time it changed. It's now a
19 flat rate of \$100 an hour with no other expenses.

20 Q. And you pick up the expenses?

21 A. Yes.

22 Q. When you were retained in this case,
23 what did you do?

24 A. I received a traffic homicide report
25 that had been prepared by the Coral Springs Police

1 Department for Mr. Brawley. Everything I received
2 has been from Mr. Brawley's office.

3 Q. I understand.

4 A. I received a videotape that was taken
5 by Coral Springs the night of the accident.

6 Q. The DUI videotape?

7 A. I don't know what you call it, but it
8 was the tape taken on the accident scene.

9 Q. Oh, okay.

10 A. I reviewed that. Then over a course
11 of I guess the next five or six months as Mr.
12 Brawley would get in transcripts, he would send
13 them to me.

14 Q. Transcripts of the prior proceedings?

15 A. Yes, the prior proceedings and
16 depositions and statements. And I guess motions
17 that had been made or testimony that had been made
18 in the case. And after he filled up over half of
19 my office, I then started reading it. I read
20 everything that I received to date.

21 Q. Have you spoken with any of the
22 witnesses?

23 A. I have spoken with the driver, Mr.
24 Marcello. I have spoken with Stan Stake, and I
25 spoke with Joe Barbuto (phonetic). He's from

1 Coral Springs. And I spoke with Stan, I guess,
2 about six or seven weeks ago we met.

3 Q. Okay. Did you prepare any written
4 reports at all for Mr. Brawley?

5 A. No.

6 Q. Have you advised Mr. Brawley as to
7 what opinion, if any, you've been able to render
8 as an accident reconstructionist?

9 A. Yes, sir.

10 Q. What is that opinion?

11 A. I have a list of opinions.

12 Q. Okay.

13 A. I don't know if you want a copy of
14 them?

15 Q. Why don't you read them in the
16 record?

17 A. Okay. I have a sheet marked
18 opinions. Number one, which is very simple, was
19 that an accident occurred. My opinion is that an
20 accident did take place and it was at this
21 intersection. And an accident report and traffic
22 homicide report was filled out.

23 MR. MCDONNELL: Doug, were you ever
24 disputing that?

25 MR. BRAWLEY: No.

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MR. MCDONNELL: Okay.

THE WITNESS: Second, number two, that the victim was wearing dark clothing. And this was obtained from the police reports and testimony from previous hearings or trial.

* And, of course, my opinion on the dark clothing would be that that would affect somewhat the visibility of the victim and also of the Defendant in seeing him.

BY MR. MCDONNELL:

Q. Okay.

A. By the clothing. Opinion number three is that I've been to the scene three times. I've been to the scene twice at night at the approximate time of the accident, and I have also been to the scene in the day time.

So opinion number three deals with that the area is not well-lit where the victim begins crossing. That is because of the fact the street lighting is primarily on the south side of the road which would be the southeast corner of the intersection.

And the lighting is not as good where the

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1 victim would have left from the north side roadway
2 and crossed south. So that area is relatively
3 dark until you reached approximately near the
4 center of the westbound lanes of travel. So
5 again, that would be a visibility-type of
6 question.

7 Q. Okay.

8 A. Number four deals with the fact,
9 based on again the police report and prior
10 testimony, that there was no light on the bike as
11 far as a head lamp.

12 Also there were reflectors on the pedals,
13 and I believe there was some mention made in the
14 testimony; however, they weren't totally certain
15 about a reflector being on the front and back of
16 the bike, which would be on the spokes of the
17 wheels.

18 Q. Okay.

19 A. This opinion number four gave me the
20 view of the case that this would reflect again the
21 visibility of the Defendant in observing the
22 victim because the reflectors on the pedals would
23 be of no use because those are made to be viewed
24 from behind or front.

25 The fact there is no headlight on the bike

1 would limit the visibility of the driver. And
2 whether or not there was a reflector in the
3 position of the reflector on the spokes of the
4 wheels, could again limit his visibility. And
5 that would be based on the fact of the angle of
6 the bike coming across the street. And we will
7 probably get into the angle matter.

8 Number five is that the victim was crossing
9 against the light. And I think that was
10 apparently not disputed either in courtroom
11 testimony or in the report. That the Defendant
12 did have the green light when he entered the
13 intersection.

14 Number six opinion. Number six is there
15 was testimony in deposition or prior trials, and
16 again, I don't know which trial, the first or
17 second trial. This was brought in to where throw
18 formulas were used as far as the pedestrian goes,
19 or the bicycle as to a possible point of rest of
20 the victim could be used with the formula to
21 indicate how fast the car was going. I think I
22 mentioned to you before in my opinion, those
23 formulas do not come into play since we have a
24 bicyclist and not a pedestrian.



25 Q. What do you base that opinion on?

1 A. I base the opinion on the testimony.

2 Q. I'm not disputing the fact that it
3 was a pede-cyclist. We agree on that. Why would
4 the throw formulas have no bearing as opposed to
5 limited bearings?

6 A. The throw formulas are meant for a
7 pedestrian. And basically what they're meant for,
8 they're used on center mass of an adult is
9 basically what they're used for. The difference
10 is that an adult would be thrown up onto the car
11 and over or through it, depending on the speed.
12 Whereas a child or a small person would be placed
13 under the car. A bicycle raises the person's
14 center of mass.

15 In this case, the person's center of mass
16 would have been raised above the hood, which means
17 that the victim would definitely be thrown onto
18 the hood of the car and not under or to the side.
19 Therefore, throw formulas are invalid.

20 Q. But normally -- I don't want to say
21 normally. You tell me where I'm making a mistake.
22 It's not uncommon for an adult pedestrian that is
23 hit to hit the windshield?

24 A. Depending on the speed of the car it
25 would not be uncommon.

1 Q. If they are standing?

2 A. If they are standing and t
3 enough momentum to throw the person onto
4 and then onto the windshield or over it.

5 Q. Over the windshield at last ma
6 contact with the car at the windshield or slightly
7 over it?

8 A. The theory goes, the higher the point
9 of impact on the vehicle with the pedestrian, the
10 faster the car is going. That's the theory.

11 Q. The higher the last point of
12 impact -- I don't understand.

13 A. The initial point of impact. I
14 should not say initial. It would be the secondary
15 contact. The first impact would be between the
16 car and the pedestrian. If the pedestrian goes up
17 onto the windshield and immediately makes contact
18 with the windshield, that speed generally is said
19 to be in the area of over 30 miles per hour.

20 If their first point of impact is with the
21 hood of the car, the roof of the car, their speed
22 then would be in excess of probably 50.

23 Q. So he would have cleared the
24 windshield. These are all ballpark figures I
25 understand.

1 A. In most cases.

2 Q. Isn't throw the distance from the
3 point of impact to the ultimate landing of the
4 pedestrian?

5 A. That's correct.

6 Q. So I can understand why we can
7 acknowledge the fact that him being the victim,
8 the pede-cyclist, why his center of gravity is
9 higher than a pedestrian?

10 A. Yes.

11 Q. But wouldn't throw still have some
12 play because there reached a point where he left
13 the vehicle and landed somewhere?

14 A. Why I would say it would not come
15 into play is the fact that in any other pedestrian
16 accident or any pedestrian accident, your initial
17 contact between the vehicle and the pedestrian is
18 either in the leg area or waist area generally
19 speaking.

20 Q. I understand.

21 A. In this case when the car technically
22 makes contact with the bike, which would be the
23 lower leg level or knee area of the victim,
24 thereby throwing the victim up onto the hood and
25 directly into the windshield.

3. 1 So you don't have the initial type of
2 impact you would have in a pedestrian accident.
3 The only place for the bicyclist to go is in the
4 windshield. There's no other place for him to go.

5 Q. My question -- Maybe you're just
6 laying it out and I'm not understanding it right.

7 A. I might be giving it wrong.

8 Q. My question is, there's going to come
9 a point in time where the pedestrian's body leaves
10 the windshield?

11 A. Yes.

12 Q. And automatically comes to rest?

13 A. Yes.

14 Q. And the difference between where he
15 left the windshield and where he comes to rest, is
16 that throw?

17 A. No.

18 Q. Okay. That's where I'm mistaken.

19 A. No, the throw would be in a situation
20 where a car is breaking and hits a pedestrian, and
21 the pedestrian goes either in front of the car or
22 off to the side. That would be where a throw
23 would come into play.

24 Q. But the throw distance is from point
25 of impact to ultimate rest?

1 A. That's correct, unless you have a
2 victim who is hung up on the car or some victims
3 get hung up on the windshield and stick right in
4 it.

5 Q. There's no evidence to support that
6 in our case, is there?

7 A. No.

8 Q. So we can assume that the victim's
9 body left this vehicle in generally the same
10 manner that a pedestrian's body would have left
11 the vehicle, but perhaps higher?

12 A. It could be, yes. That would be a
13 possibility. However, we don't know at what point
14 or how the pedestrian -- I shouldn't say the
15 pedestrian, but how the victim traversed the
16 vehicle, we don't know what happened after he came
17 in contact with the windshield. We know he came
18 off. We know where, but don't know how he rotated
19 around the car.

20 Generally an accident investigator will
21 look for that evidence on the scene to see if
22 maybe the car antenna would be bent. Maybe
23 there's some type of body debris on top of the car
24 to indicate a path of travel, or something like
25 that. And we don't have that here.

1 Q. Did you talk to Mr. Marcello about
2 that?

3 A. As to how the pedestrian rotated?

4 Q. Yes.

5 A. I don't believe he knew. I asked him
6 something, and I don't think he knew.

7 Q. He left you with the impression he
8 wasn't going to be able to help you in that area?

9 A. In that area, yes.

10 Q. Have there been any studies related
11 to throw of a pede-cyclist that you're aware of?

12 A. Not that I'm aware of, no.

13 Q. So you're saying that the studies
14 that have been done have been done with pedestrian
15 throw and you disregard those studies for the
16 purposes of our case?

17 A. In this case, yes, sir, because we
18 don't have a pedestrian, we have a bicyclist.

19 Q. Because of the center of gravity
20 being higher of a pede-cyclist?

21 A. Yes.

22 Q. What's your next conclusion or
23 opinion?

24 A. Opinion number seven is that the
25 point of collision, or I should say possible point

1 of collision, and that's basically based on the
2 police report, is east of the crosswalk. It's not
3 in the crosswalk. It's east out of the crosswalk.

4 Q. Okay.

5 A. Opinion number eight is based on the
6 testimony, prior testimony, that Mr. Marcello did
7 have a green light when he entered the
8 intersection.

9 Number nine, Mr. Marcello stopped his
10 vehicle at the first entrance that he came to,
11 which would be the - I guess the old Banana Boat,
12 which is just east of the point of rest of the
13 victim and east of the point of collision.

14 Q. Did you calculate that distance?

15 A. Yes.

16 Q. How far is it from the point of
17 resting place of the victim?

18 A. That I'm going to have to look up.

19 Q. We can come back to it.

20 A. I don't have it right here, but I'll
21 get it for you.

22 Q. I understand.

23 A. Number ten opinion. Number ten is
24 that the distance of the skid marks was 48.76 feet
25 and not 53 feet as indicated.

1 Q. How did you draw that conclusion?

2 A. I drew that conclusion at first there
3 was a difference whether it was 48 or 53. So I
4 took - I believe in the initial accident report
5 filed by the investigator, not Newman but the
6 other guy, you know who I mean?

7 Q. He originally calculated it to be 48?

8 A. He calculated it to be 48 and his
9 testimony was that he did not measure it with a
10 ruler. That he just stepped it off or something
11 like that. I'm not sure.

12 And Newman was positive then that he went
13 back and that it was 53 feet. So what I did is I
14 looked at the report, and I looked at his surface
15 mark sheet, which he has a sheet that indicates
16 surface marks, are you aware of that sheet?

17 Q. Newman's?

18 A. Yes.

19 Q. In his traffic homicide report?

20 A. He states in the report, right, he
21 states in the report, he indicates in his report
22 that there are only three wheels that leave skid
23 marks.

24 Q. Okay.

25 A. As an accident investigator, what you

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1 do is you take the skid marks, you find out which
2 marks were braking - which wheels were braking,
3 which tires.

4 In this case you had three according to
5 Officer Newman who was on the scene. The total
6 skid marks prior to the point of impact, this
7 would be prior to the point of impact, is 30.38
8 is what he has listed in his surface mark sheet.

9 Q. Okay.

10 A. After the point of impact he has
11 18.38.

12 Q. Okay.

13 A. That comes up to 48.76 feet.

14 Q. Okay.

15 A. And I also found it unusual in a
16 homicide, or I should say a traffic fatality in
17 which they knew they had very quickly. I don't
18 know anyone who would step off skid marks.

19 So I think the original officer in helping
20 take the measurements, he wrote them down
21 correctly. And Officer Newman made a mistake
22 somewhere in his notes. Because in the homicide
23 report, he has listed very clearly that the 30 and
24 18 come up to 48. Therefore, I'm using the 48
25 feet and not the 53.

}
30.38
18.38

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1 Q. Okay.

2 A. And that's again based on his report.
3 But I know in court he said 53.

4 Q. Okay.

5 A. So somebody --

6 Q. It's one or the other. It's not
7 both.

8 A. It's one or the other. I think it's
9 48 feet.

10 Q. Based upon the fact that he added up
11 the 30 plus the 18 at another point in his report?

12 A. Yes. Well, that's where he actually
13 would have had the total distance is on the
14 surface mark sheet. And the homicide report they
15 have a list on one of the pages, and I'm not sure
16 which page it is, he has listed all the
17 differences, or you know, all the markings that he
18 measured. And that comes up to 48 feet, and I
19 would assume that's his official report.

20 Q. Okay.

21 A. Number eleven opinion is that based
22 on all the information that I have to date, I see
23 no indication that Mr. Marcello was exceeding the
24 posted speed limit in the area.

25 Q. Okay.

1 A. Number twelve is that it's my opinion
2 that based upon all the facts that I have visible
3 to me at this point, that the accident itself is
4 the fault of the pede-cyclist. And that's
5 basically for the eleven reasons I gave you prior
6 to this opinion.

7 Q. Okay.

8 A. And opinion number thirteen is
9 really -- I don't know if you want to consider
10 this as an opinion or not, but I listed it as one
11 is that there is a possibility of a vision
12 obstruction by Mr. Marcello when he is passing, or
13 if he is passing the other witnesses. I think
14 there was one or two witnesses that was going
15 eastbound.

16 Q. Other drivers?

17 A. Right, the other drivers. And I
18 believe Mr. Marcello was in the curb lane at least
19 when these witnesses saw him or drivers saw them.
20 And at some point when he was approaching the
21 intersection, if he did pass them as they stated,
22 which I have no reason to doubt, that at certain
23 points during that passing maneuver, his vision
24 would have had to have been obstructed by those
25 cars as to their exact position that I can't give

1 you because I don't believe they were certain
2 either. So that's more or less a hypothetical to
3 you.

4 Q. So you can't say his vision was
5 obstructed. If you were to assume that the other
6 vehicles were moving in the same direction he was
7 moving at the time he came through the
8 intersection, you're saying --

9 A. Well, I would say that there had to
10 be a vision obstruction at some point if he did
11 indeed pass these cars as they stated.

12 Q. I see what you're saying.

13 A. I have no reason to believe they're
14 not telling the truth. If he did, in fact, pass
15 these cars, there was a vision obstruction. But
16 as to at what point on the roadway and where it
17 would have been, that I can't tell you.

18 Q. But if he didn't pass these cars,
19 somebody else would have hit the pede-cyclist?

20 A. I guess that's true. Depending again
21 on their position.

22 Q. I guess you could conceivably all go
23 together, but if the other vehicles were ahead of
24 him, they would have either had to slam on their
25 own brakes or hit him, the pede-cyclist?

1 A. I agree with that, yes.

2 Q. What did Mr. Marcello tell you?

3 A. Basically we had a very short
4 conversation. Mr. Brawley came to the scene. I
5 just asked Mr. Marcello a couple of questions if
6 the roadway was the same. If he noticed any
7 differences, or changes, or new lines, or new
8 lanes, or anything like that.

9 And he stated that he thought the
10 intersection appeared the same. He told me which
11 way he was going, which would be eastbound. He
12 told me which lane he was in, which would be the
13 curb lane. He told me where he stopped. He told
14 me basically the position of his car when he
15 entered the parking lot of the Banana Boat, I
16 believe it was.

17 And I asked basically if he knew anything
18 else or had any other information that could help
19 me as to his possible speed. And the only thing
20 he said about the speed was that he couldn't
21 remember exactly, but he was almost positive he
22 wasn't speeding. He was in no hurry to get
23 anywhere, or he didn't have a date or anything.
24 So our conversation was maybe five or ten minutes.
25 And the rest of the time I spoke to Mr. Brawley on