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Certified Court Reporter

INDEX OF EXAMINATIONS

	Page
RICK SWOPE Direct Examination by Mr. Weintraub	4

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P R O C E E D I N G S

April 28, 1999

State vs. Richard Green

Whereupon,

RICK W. SWOPE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. WEINTRAUB:

Q. Mr. Swope, state your name, please, for Judge Graves.

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

MR. WEINTRAUB: Your Honor, am I allowed to sit down?

THE COURT: Yes, sure; if you'd like.

Q. (By Mr. Weintraub) What is your occupation, Mr. Swope?

A. I do primarily accident reconstruction. I also do consulting in the field of DUI, breath testing, and field sobriety exercises. And I also do some articles and I do research and do testing with the breath testing devices.

Q. Have you ever been in law enforcement?

A. Yes.

Q. Explain that to Judge Graves.

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1 A. I was a police officer for fifteen years. The
2 last six years that I was an officer it was with the
3 Broward County Sheriff's Office in Ft. Lauderdale. And
4 four of those six years I was the administrative
5 coordinator of the DUI Task Force and Traffic Homicide
6 Unit.

7 THE COURT: Hold on a second. Just pull
8 that mic just a little closer and slow down.
9 I know you're on your way to Florida, but
10 slow down just a little bit.

11 THE WITNESS: I'm sorry about that.

12 THE COURT: That's all right. Slow down
13 a little bit for us.

14 Q. Mr. Swope, were you ever in the Military,
15 please?

16 A. Yes, I was.

17 Q. How many years?

18 A. Three years.

19 Q. Mr. Swope, have you ever acted as an instructor
20 for the National Highway Traffic Safety Administration?

21 A. Yes.

22 Q. Could you please briefly and for the record
23 tell Judge Graves what -- we'll use the acronym NHTSA --
24 what NHTSA is?

25 A. NHTSA is the National Highway Traffic Safety

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1 Administration. I was selected in either 1985 or late
2 '84; I'm not sure. At that time you were selected as
3 instructors. I went through an instructor course at that
4 time put on by the government or sponsored by the
5 government. And I believe the course, I had to attend
6 two of the standardized courses. At that time they were
7 40 hours each, so I had to go through 80 hours. I went
8 through two instructor courses, 40 hours each.
9 And I had to do, I think, you had to teach with another
10 instructor in the room for six months or something like
11 that periodically. And I'm qualified to teach in all 50
12 states and assigned certification as an instructor.

13 Q. How many police officers and state troopers do
14 you think you have taught over the years on field
15 sobriety testing?

16 A. Probably well over one thousand.

17 Q. Have you held any classes in Georgia?

18 A. Yes.

19 Q. And are you familiar with the books that NHTSA
20 uses?

21 A. Yes.

22 Q. Are you familiar with the book that I exhibited
23 yesterday to Prosecutor Csehy?

24 A. Yes.

25 Q. And is that the book that they use in Georgia?

1 A. It is.

2 Q. Mr. Swope, are you charging for your services
3 today?

4 A. Yes.

5 Q. Is that going to impact on your testimony?

6 A. No.

7 Q. Am I hiring you to get your answers?

8 A. Not me.

9 Q. Now, Mr. Swope, let me ask you this. Have you
10 been to college?

11 A. Yes.

12 Q. What's your educational background?

13 A. I have a bachelor's degree in criminal justice
14 from St. Thomas University in Miami. I have a master's
15 of science degree in technology and engineering from the
16 University of Miami.

17 Q. Sir, how many arrests for DUI did you make when
18 you were working for law enforcement?

19 A. Myself, I probably made around 1500, somewhere
20 in that area, and I probably observed several thousand.

21 Q. Mr. Swope, do you belong to any professional
22 associations?

23 A. Yes.

24 Q. What types of associations that would be
25 relevant to the Intox 5000 machine and to field sobriety

1 testing?

2 A. The Society of Automotive Engineers; the
3 International Association of Management and Technology
4 which actually covers the engineering aspects of
5 equipment and statistical analysis and those kinds of
6 things. Those are primarily what I belong to.

7 Q. What type of breath machines do they use in
8 Florida?

9 A. They use an Intoxilyzer 5000 Series.

10 Q. Similar to the one in Georgia?

11 A. Yes. There are actually three models. Georgia
12 has the 68. Florida uses the 64 and 66 models.

13 Q. Are you familiar with the 68 model in Georgia?

14 A. Yes.

15 Q. And you've been a teacher at seminars on field
16 sobriety testing and on the Intox 5000?

17 A. Yes.

18 Q. Have you published articles?

19 A. Yes.

20 Q. If Mr. Csehy needs to know, then you can give
21 him that. But just for purposes of now, I'm not going to
22 ask you to get into your articles. But do you have any
23 articles on field sobriety testing?

24 A. Yes.

25 Q. Any articles on the Intox 5000 machine?

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1 A. Yes.

2 Q. Have you ever testified as an expert witness
3 before on the areas of field sobriety testing and the
4 Intox 5000?

5 A. Yes.

6 Q. Before I get into that, let me ask you, are you
7 familiar with the concept of retrograde extrapolation?

8 A. Yes.

9 Q. Could you briefly explain what that is for
10 Judge Graves?

11 A. Well, extrapolation is just simply just taking
12 either a number, whether it be off of a breath testing
13 device; it could be off of measured amounts of alcohol
14 which you give a person. You take their weight and you
15 take averages prior to burn-off rate with their weight
16 and the amount of alcohol they had and come up with the
17 numerical value of what a person should be at a certain
18 point in time based on either what a breath reading would
19 show or what the person told you they drank or it could
20 be done off a blood test. There are various ways to do
21 it.

22 Q. And have you engaged in applying that formula
23 over the years when you've been working with breath
24 machines in field sobriety testing?

25 A. Yes.

1 .Q. Now, sir, how many times have you testified as
2 an expert witness in the areas of retrograde
3 extrapolation, field sobriety testing, the Intox 5000?

4 A. Well, somewhere certainly way over 500. I hate
5 to give a figure, but I'm approaching one thousand,
6 somewhere in that area.

7 Q. Have you ever testified for the state
8 prosecuting officers?

9 A. Sure.

10 Q. How many times has the state prosecutors
11 introduced you as a witness, as an expert witness; I'm
12 sorry?

13 A. Several hundred. Obviously, when I was an
14 officer I testified quite often in field sobriety.

15 Q. After you left law enforcement, have you ever
16 testified as an expert witness?

17 A. Sure.

18 Q. Do you get paid by the state to do that?

19 A. Yes, I bill the state, sure.

20 Q. The same type of fee you bill the defense?

21 A. Actually, I bill the state less. Governmental
22 agencies, I bill a little less to.

23 Q. Right. Have you ever been declared as an
24 expert witness in the City Court of Atlanta Traffic
25 Division?

1 A. Yes.

2 Q. Do you know how many times and which judges; do
3 you remember the names of the judges?

4 A. I think I've been in front of this judge on one
5 occasion.

6 Q. Judge Graves?

7 A. Yes; and a couple of other judges here.

8 MR. WEINTRAUB: Your Honor, at this
9 time I'd like to offer Mr. Swope as an expert
10 in the three areas that I voir dired him on.

11 THE COURT: Any objection, Mr. Csehy?

12 MR. CSEHY: I do not object to the field
13 sobriety and the Intoxilyzer 5000. I do
14 object to the retrograde extrapolation.

15 THE COURT: All right. I'm going to
16 allow him to be entered in as an expert in
17 all three areas over the state's objection.

18 Q. (By Mr. Weintraub) Mr. Swope, briefly for the
19 record, even though Judge Graves has heard this before,
20 but let's assume this is his first case. What are field
21 sobriety tests?

22 A. They're really divided attention exercises and
23 they're meant to assist an officer and determine if
24 someone is safe or not safe to drive a vehicle.

25 Q. When troopers or police officers go to the

1 NHTSA training, are they given a procedure as to how the
2 tests are to be handled in order to be done according to
3 what the government wants?

4 A. Yes.

5 Q. And how do the troopers learn this; how do the
6 police officers learn this?

7 A. Well, they learn it through manuals; they learn
8 it through training during the course, a period of time.
9 They learn it through exercises. I believe the trooper
10 here yesterday indicated he had also been present when
11 individuals were given alcohol, volunteers, I think, he
12 used the word. And that's how they begin to do their
13 testing.

14 Q. You viewed the video yesterday when Judge
15 Graves was looking at it, correct?

16 A. Yes.

17 Q. You also viewed it with me in the jury room?

18 A. Yes.

19 Q. And before trial?

20 A. Right.

21 Q. And I also sent you a copy several months ago
22 to view?

23 A. You did.

24 Q. So is it fair to say you've looked at it at
25 least three times?

1 A. At least.

2 Q. And assuming the car was -- in your observation
3 of the car, was it weaving at all?

4 A. I didn't see any on the copy of the tape I had,
5 no.

6 Q. Did you see any on the video that was played in
7 front of Judge Graves?

8 A. No.

9 Q. Would you have pulled somebody over who was
10 maintaining the proper speed for weaving in that instance
11 if you were a police officer?

12 A. Not if they were maintaining the proper speed,
13 no.

14 Q. Assuming that vehicle was over the speed limit,
15 would that give you a reason to have pulled it over?

16 A. Sure.

17 Q. Tell Judge Graves, what did you observe of Mr.
18 Green from the time the car was blue lighted until the
19 time the trooper started to talk to him when he got out
20 of the vehicle. What observations did you make?

21 MR. CSEHY: I'm going to object to that,
22 Your Honor. I mean, you're an intelligent
23 man. I think you can draw your own
24 conclusions as to what you saw on the video
25 instead of having a witness tell you what he

1 thinks you saw on the video.

2 THE COURT: What's the legal objection?

3 MR. CSEHY: The video speaks for itself.

4 MR. WEINTRAUB: Well, then, let's move
5 to strike all the testimony of Trooper
6 Puckett. If the video speaks for itself,
7 then why did the trooper go in and give all
8 these explanations of what he was observing?

9 MR. CSEHY: For the record.

10 THE COURT: Objection overruled.

11 Q. (By Mr. Weintraub) Okay, Trooper Swope, Mr.
12 Swope, would you please advise us what manifestations of
13 impairment or no manifestations of impairment did you
14 observe?

15 A. I saw no manifestations at all. I thought that
16 I observed several things that indicated to me that there
17 was no manifestations of impairment.

18 Q. Such as?

19 A. Such as the fact that Mr. Green exited the
20 vehicle; there was no stumbling; no leaning onto the car
21 for support. His speech was clear the entire time and
22 there certainly was no slurring of speech whatsoever
23 anywhere in the video. He answered all the questions
24 directly; he answered them quickly. He also did what I
25 considered to be some difficult tasks. Number one is he

1 had a rental vehicle -- at lest I understand it was a
2 rental vehicle. I rent about 80 cars per year. Rental
3 vehicles have two keys. They don't have one key that
4 opens the door; they have two. That's the way rental
5 vehicles come.

6 Mr. Green -- and usually like I am with a
7 rental car, you're unfamiliar with it a little bit. I
8 mean, you know obviously how to drive it, but you're
9 unfamiliar. He went to the trunk and he put the key
10 directly in the trunk. He opened the trunk and he found
11 his driver's license. The trooper asked for his rental
12 papers, which he went around to the car, and he again
13 used the key to open the car door. In fact, it was at
14 that point that the trooper stumbled somewhere in the
15 area. It wasn't Mr. Green that stumbled. The trooper
16 even admitted that he stumbled in that area, tried to
17 grab onto the door or something.

18 Mr. Green immediately retrieved the papers;
19 gave them to the trooper. Then he performed the field
20 sobriety exercises. But there certainly were absolutely
21 no signs of impairment at that point whatsoever, none.

22 Q. On the video?

23 A. That's correct.

24 Q. Now, let me add two factors that the trooper
25 gives which cannot be on the video. The trooper said --

1 there's no reason to think he was not telling the truth,
2 but there was an odor of alcohol?

3 A. Right.

4 Q. And he said that Mr. Green's eyes were
5 bloodshot and watery?

6 A. Okay.

7 Q. Let's assume that that was there; that he
8 smelled from alcohol.

9 A. Okay; I'm making that assumption.

10 Q. And that the eyes were red and watery?

11 A. Sure; I believe that.

12 Q. Now, what's happening, in your opinion, if I
13 add those two factors into what you observed prior to the
14 commencement of the horizontal gaze?

15 A. Well, certainly if the officer, if he indicated
16 he saw that, then he probably would give field sobriety
17 exercises or at least one or two. So I have no problem
18 with that.

19 Q. And Mr. Green admitted to the officer that he
20 had -- at that point he said he had two beers and a
21 coffee and a glass of wine. You heard him say that?

22 A. Right. I think he said that somewhere during
23 the HGN or right before it or something.

24 Q. Okay. Now, I want to ask you this. What is
25 the problem with Mr. Green coming out of the vehicle

1 quickly and putting on his jacket? What does that
2 indicate to you about alcohol impairment?

3 A. Nothing.

4 Q. What's the big deal?

5 A. I don't know.

6 Q. Except maybe for your safety. I mean, you have
7 to agree with that, that maybe officers have to be --

8 A. Well, obviously the officer always looks for
9 his safety. But I saw nothing unusual with him being out
10 of his vehicle. When I was stopped two weeks ago I got
11 out of my vehicle right away.

12 Q. Okay. So, now, the horizontal gaze nystagmus,
13 did the trooper do it the way he was supposed to do it?

14 A. No.

15 Q. What was the problem?

16 A. Well, the problem was that first of all, he
17 didn't make the required number of passes. He only made
18 8 passes when he should have made 12. So, therefore, he
19 was leaving out one of the clues. I don't know which
20 clue. I think you kind of alluded to that yesterday.
21 But he obviously left out one clue. He had to.

22 Q. This is what the Trooper said yesterday. The
23 Trooper said he was educated in his NHTSA course; that
24 they do tracking of the eyes and smooth pursuit at the
25 same time?

1 A. No.

2 Q. First, very briefly, explain to Judge Graves
3 what's tracking and smooth pursuit.

4 A. Well, obviously the Trooper indicated that he
5 wanted to look for tracking and that's just for the
6 officer to see that the eyes of the subject he's working
7 with can follow the object. In this case he used his
8 finger, which is okay, and moved it from side to side.
9 He's looking to see if he has equal tracking and both
10 eyes move together right or left. And that's determined
11 because some people, a very small percentage, don't track
12 easily. If they don't track easily, then you really
13 can't do the test.

14 Q. Well, let me stop you right there. Did I have
15 you do the HGN yesterday on Mr. Green?

16 A. Right.

17 Q. And under oath I'm asking you, did you track
18 his eyes?

19 A. I did.

20 Q. And what did you notice?

21 A. I noticed that he had a little erratic movement
22 and his eyes as far as tracking. I still would have done
23 tests, but I could tell there still was some jumping and
24 stuff. Some people have it.

25 Q. Let me ask you this. After you do the

1 tracking, he said that the tracking was done at the same
2 time that you measure smooth pursuit. Is that correct?

3 A. No.

4 Q. What is the smooth pursuit measurement?

5 A. The smooth pursuit, after you do the tracking,
6 would be done to slow the stimulus down, or the object in
7 this case. I think the Trooper used his finger. And
8 then he would test twice for smooth pursuit in each eye.

9 Q. Did he do that?

10 A. No. Well, it looked like he did it, but he
11 combined the tracking and the smooth pursuit, which you
12 can't do both eyes. He did both eyes together in one
13 movement, and you can't do that. So whether he was
14 relaying one to the other, I can't say.

15 Q. So if he did both of them together as he said
16 he did, what does that do for the validity of the test?

17 A. It would make the test not valid.

18 Q. What does the manual say about having every
19 test to be done according to the exact procedures for it
20 to be valid? Do you want to read that or can you relay
21 that to the Judge?

22 A. I can just relay it to the Judge. The manual
23 just says that if the tests are not performed properly by
24 the officer, you cannot rely on the results.

25 Q. Now, he also said that he was educated -- at

1 the NHTSA classes that he attended that you could hold
2 the stimulus as high as you want to allow you to see as
3 much of the eye as possible. What is he talking about;
4 is that correct?

5 A. I really didn't know what he was talking about
6 at that point. I heard him say it, but I don't know what
7 he was talking about, because that's not a correct
8 instruction.

9 Q. What does NHTSA require police officers to do
10 regarding the height of the stimulus?

11 A. They require them to either keep the stimulus
12 to eye level or just above eye level.

13 Q. How high did he keep it?

14 A. It looked like on the video it was above his
15 head.

16 Q. Whose head?

17 A. Mr. Green's head.

18 Q. So he held the stimulus too high?

19 A. Yes, definitely.

20 Q. Would that invalidate the test?

21 A. Yes.

22 Q. He indicated that he kept the stimulus 18
23 inches away from the person's face --

24 MR. CSEHY: Judge, I'm going to object.

25 This is the silliest line of questioning to

1 begin with --

2 MR. WEINTRAUB: Just make an objection.
3 I don't want to hear that.

4 THE COURT: Hold on --

5 MR. CSEHY: First of all --

6 THE COURT: Hold on; just wait. Just
7 hold on. Make your objection, Mr. Csehy.

8 MR. CSEHY: Trooper Puckett said you
9 hold it 12 to 18 inches, but that he held it
10 from the 12 to 15 inch range. And --

11 MR. WEINTRAUB: He said --

12 THE COURT: Hold on, Mr. Weintraub. Let
13 him finish making his objection. Let him
14 finish and if you want to say something when
15 he finishes, I'll allow you to speak, sir.

16 MR. CSEHY: I'm just going to ask that
17 the evidence not be misconstrued. I mean, we
18 could watch the video to see if Trooper
19 Puckett held his hand one foot and a half
20 away from his head to begin with. I'm just
21 going to ask that Mr. Weintraub's continually
22 trying to put this 18 inches when he never
23 said he held it 18 inches. I'm going to ask
24 the Court to hold to what the evidence was.
25 I know the Court remembers it.

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1 I'm trying to be patient throughout
2 this, but it's constant misconstruing of all
3 the evidence in the case.

4 THE COURT: Mr. Weintraub, would you
5 like to respond to that?

6 MR. WEINTRAUB: Does he want me to give
7 him a pill so he's not agitated?

8 THE COURT: No, I'd like for you to
9 respond to his objection, sir.

10 MR. WEINTRAUB: Your Honor, the record
11 is clear. Let me make it a hypothetical
12 question.

13 THE COURT: Yes.

14 Q. (By Mr. Weintraub) If Trooper Puckett said
15 that he held the stimulus to 18 inches away, is that
16 proper?

17 A. No, it wouldn't be.

18 Q. What is the distance that the rules require him
19 to do it at?

20 A. 12 to 15.

21 Q. Was this horizontal gaze test, in your opinion,
22 one that should be relied upon by an officer in trying to
23 measure the clues in Mr. Green's eyes?

24 A. No, sir.

25 Q. Did you notice any other observations on Mr.

1 Green while the HGN was going on such as his inability to
2 follow the instructions in moving his head or him swaying
3 at all?

4 A. No. I thought that again that's a position
5 that, Mr. Green was standing in an erect position during
6 that period of time, and he appeared to follow
7 instructions. There was no movement by him at all.
8 There was no swaying and no movement back and forth. His
9 balance was perfect and there was nothing wrong with him.

10 Q. Even though Trooper Puckett may be correct and
11 Mr. Green does not wear contacts, in all of your years of
12 doing this, did you feel that you were comfortable in
13 determining if someone wears contacts?

14 A. Well, not without asking. I can't tell if they
15 have contacts without asking.

16 Q. What was he taught in school about contact
17 lenses?

18 A. Again, you would just ask if they were wearing
19 contacts or not.

20 Q. As to the HGN, sir, how reliable is that field
21 sobriety test?

22 A. Percentage-wise it's 77%, I believe the trooper
23 mentioned it.

24 Q. Have in all of your years where you've been
25 teaching or training officers, have you seen people

1 who've had below a 0.10 or no alcohol at all to be graded
2 by officers as having six clues?

3 A. Not unless they had some kind of problem with
4 them or they had some kind of disability or they were on
5 drugs. Obviously, drugs sometimes can be an indicator
6 but no, I haven't.

7 Q. But if the test was not done properly, then
8 it's questionable as to finding of six clues to be a
9 valid finding, correct?

10 A. Right.

11 Q. As to the walk and turn, how would you have
12 graded Mr. Green's performance on the walk and turn?

13 A. I thought he did very well.

14 Q. The Trooper gave him, I believe, four clues.
15 Describe --

16 A. Four; I thought it was three. Maybe I'm wrong.

17 Q. Well, he gave him ten steps -- he changed his
18 report. He gave him three first.

19 A. Okay.

20 Q. How do you think he did very well and the
21 Trooper thinks he didn't do well; he flunked on that, I
22 guess?

23 A. Well, the only thing I really couldn't see on
24 the video, which you couldn't see, was the Trooper
25 indicated that he did not make heel to toe contact on all

1 eighteen of the steps. I couldn't see, so I can't
2 comment on that part. But it appeared that he walked
3 straight; his hands were at his side. The only
4 difficulty that Mr. Green had at one point was
5 maintaining his balance when he was in a heel to toe
6 position.

7 The Trooper began to explain that, and at some
8 point again the video shows exactly what time. But at
9 some point the Trooper must have received a call and he
10 got on the radio, and at that point Mr. Green broke the
11 stance. And I didn't think that was unusual because the
12 Trooper was going through another function, which was
13 okay. He was probably calling the office to let them
14 know that he was okay.

15 And Mr. Green broke the stance. The Trooper
16 finished his regular communications, got back into
17 position and he performed the test. And I thought he
18 performed it well. His balance certainly looked good.
19 There was no swaying.

20 At some point the Trooper went off video, at
21 some point either right after the HGN or somewhere in
22 this area. I don't remember exactly. But Mr. Green
23 stood there for over a minute and there was absolutely no
24 movement, not even the quarter inch that he said he
25 moved.

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1 Q. How about the fact that Mr. Green was starting
2 a little bit sooner than the Trooper wanted him to start?
3 Isn't that a clue that you look for?

4 A. It's a clue, but it's not unusual. People do
5 that a lot. When a trooper starts moving it happens all
6 the time. People tend to want to go with them. So it's
7 not unusual to tell somebody a couple of times, say,
8 look, wait until I'm finished before you take a step,
9 because people just kind of want to do that. So it's
10 really not an unusual thing. And after the Trooper
11 explained it to him a couple of times, Mr. Green then
12 waited and then did the test.

13 Q. Let me ask you, sir, what is the requirement in
14 having a person walk on a line?

15 A. Well, the requirement is that there should be a
16 line under some circumstances. And if there is not a
17 line, I think the Trooper indicated that he did not
18 grade, so to speak, Mr. Green because he didn't have a
19 line. But there should be a line or they can put an
20 imaginary or make-shift line down, so to speak.

21 Q. What were you all doing in Florida with the
22 line?

23 A. Well, we taught officers pretty much everywhere
24 in all the states that you can either put a chalk line
25 down or -- but we handed out our people rolled up weather