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Certified Court Reporter

P R O C E E D I N G S

April 29, 1999

State vs. Richard Green

VOLUME II

Whereupon,

RICK SWOPE

was cross-examined.

CROSS-EXAMINATION

THE COURT: Sir, you're already sworn in. I guess we're at the point now where the State has an opportunity to cross-examine.

BY MR. CSEHY:

Q. Good morning, Mr. Swope.

A. Good morning.

Q. I'm Rand Csehy. I'm the Assistant Solicitor assigned to this case. We've met previously?

A. Correct.

Q. I met you in the State vs. Keila Hatley, correct; do you recall that case?

A. I don't recall.

Q. Do you recall being up here in November?

A. No.

Q. Do you know Monte Davis; you know who Monte Davis is?

A. Sure.

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1 Q. Do you recall testifying in a case for Monte
2 Davis recently?

3 A. I don't remember when it was. It could have
4 been six or seven months ago.

5 Q. I have the transcript today. Do you recollect
6 me questioning you the last time you were in court?

7 A. I recollect you questioning me, but I just
8 don't remember when.

9 Q. Now, I'm assuming you got in from Florida and
10 you took the plane back?

11 A. That's the way I did it. Which time?

12 Q. Today?

13 A. For the last three days I've been taking the
14 plane back and forth.

15 Q. You went to the airport and boarded the
16 airplane; correct?

17 A. That's how I took it back.

18 Q. And you arrived in Atlanta. Well, let me ask
19 you, did the plane work?

20 A. Well, actually, no. It broke down and we had
21 to change planes, actually. It was two hours late; the
22 plane broke down and we had mechanical problems and we
23 had to go back to the gate. It pulled out again; we got
24 on the runway and started to taxi and it broke down
25 again. So we had to go back and switch airplanes.

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1 Q. Mr. Swope, you're here, right?

2 A. Yes.

3 Q. The plane that you took here, did it work?

4 A. The one that I took here, yes. The one that I
5 got on didn't.

6 Q. Well, you eventually got on a plane that
7 worked, didn't you?

8 A. That's right.

9 Q. And did you check the engine before you got on
10 that plane?

11 A. No; that's not my job.

12 Q. Well, let me ask you, how did you know
13 everything was working on that plane?

14 A. I don't. I believe that a private company that
15 makes their money in transporting people, I give credit
16 to them. I'm sure that they work on the maintenance of
17 the plane and they have FAA rules that they have to
18 follow. And I believe it works properly.

19 Q. And it would be safe to assume that the plane
20 was working that day?

21 A. I'm assuming because I got here, right.

22 Q. I want to ask you; I want you to give me a
23 specific. What's wrong with Intoxilyzer 68-1064 in this
24 case?

25 A. What's wrong; I don't know.

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1 Q. Tell the Court what went wrong that night.

2 A. I don't know what went wrong that night with
3 the exception of the problems I indicated that the
4 machine had.

5 Q. Now, Mr. Swope, you and I both are experienced
6 in trial tactics. You know on cross-examination, yes or
7 no questions, and then if you need to explain you can?

8 MR. WEINTRAUB: Your Honor, I don't
9 think he needs to school the witness. I
10 object to him telling the witness what his
11 role is. That's the role of the Judge. I
12 object to him telling the witness what he
13 needs to answer and how he needs to answer
14 the questions. If he has a problem, let him
15 address the Court.

16 THE COURT: Mr. Csehy, if you need for
17 me to give directions to the witness, inquire
18 to me, Sir.

19 Q. (By Mr. Csehy) I want you to tell the Judge in
20 this case on this night when your client took his test,
21 what went wrong that he should disregard this test?

22 A. I don't know specifically what went wrong with
23 the exception of all the things that are inherently wrong
24 with the intoxilyzer. And just like any vehicle, you
25 brought up the plane. There are all kinds of problems

1 that are associated with automobiles every year. Once
2 they know there's a problem, the manufacturer corrects
3 the problem.

4 Q. So let me ask you this. So there's nothing
5 specific except -- you're saying that these things could
6 go wrong; correct?

7 A. They can go wrong, but the variety of the
8 things add up to make the intoxilyzer not reliable;
9 that's correct.

10 Q. Now, I asked you about Keila Hatley case.

11 A. Sure.

12 Q. Just to refresh your memory. Do you recall --
13 let me ask you if you recall --

14 MR. WEINTRAUB: Excuse me, Your Honor.
15 There's no basis to have his memory
16 refreshed. There's no showing that his
17 memory needs to be refreshed.

18 THE COURT: What is your objection?

19 MR. WEINTRAUB: The objection is before
20 you start reading from another trial
21 transcript --

22 THE COURT: Foundation?

23 MR. WEINTRAUB: He has not laid a
24 foundation that his memory needs to be
25 refreshed, Your Honor.

1 THE COURT: How do you respond to the
2 foundational objection?

3 MR. CSEHY: I was just turning to the
4 page, Judge. I wasn't about to read it.

5 THE COURT: All right; let's see what
6 he's going to do. I will reserve my ruling
7 on the objection.

8 MR. WEINTRAUB: Yes, sir; thank you,
9 sir.

10 THE COURT: All right.

11 Q. (By Mr. Csehy) If you will recall back in
12 November -- you've already said you don't remember that
13 case by the defendant's name, I at least?

14 A. By the name; that's correct. I remember you
15 and Monte.

16 Q. Do you remember in that case the state
17 introduced an inspection certificate that was inspected
18 on one day but notarized like four months later? Does
19 that refresh your recollection?

20 A. No.

21 Q. If you'd look at your testimony that day would
22 that possibly refresh your memory?

23 A. Possibly, sure.

24 MR. CSEHY: Your Honor, may I approach?

25 THE COURT: Yes.

1 MR. CSEHY: Thank you. I have a sealed
2 court copy if the Court would rather me do it
3 that way.

4 THE COURT: Mr. Weintraub.

5 MR. WEINTRAUB: I don't have a problem
6 with him using that document. I believe you
7 show the document first to opposing counsel.
8 I may be wrong; I don't know.

9 THE COURT: Why don't you show it to
10 opposing counsel.

11 MR. WEINTRAUB: I am entitled to look at
12 the document rather than just looking at the
13 cover of it; am I not?

14 THE COURT: Yes; you're entitled to it.

15 MR. WEINTRAUB: Do you have a copy for
16 me? What lines are you referencing, sir?

17 THE COURT: Do you happen to have two
18 copies?

19 MR. CSEHY: I have a sealed copy if the
20 Court is willing to reseal it for me.

21 MR. WEINTRAUB: You can unseal it, Your
22 Honor. It's --

23 MR. CSEHY: Right. But if anybody ever
24 wants to use it again, they'll have to show
25 that that is an official copy. I'd be more

1 .than happy --

2 MR. WEINTRAUB: You don't need to show
3 me anything in the transcript. Go ahead;
4 thank you.

5 Q. (By Mr. Csehy) Mr. Swope, I'm going to show
6 you a transcript, the State of Georgia vs. Keila Hatley,
7 November 10, 1998, and ask you to read, sir, if you
8 would, showing you page 34, line 17 and down. And then
9 page 35, down to line 15 and see if that refreshes your
10 memory.

11 A. Okay, line 17 to 15 on the opposing page?

12 Q. Right; correct.

13 A. (Complies.) I don't remember it specifically,
14 but I'm sure if that's what I said, I said.

15 Q. In that case what happened was the state
16 introduced the certificate of inspection, correct?

17 A. It looked like it had a different date or
18 something during the inspection.

19 Q. And the notarizing you said that you felt that
20 was a problem; correct?

21 A. Yes.

22 Q. Now, in this case you've had the opportunity to
23 look at it?

24 A. I've seen both of them; yes, sir.

25 Q. And they were both notarized on the same date?

1 A. Correct.

2 Q. There was no problem in this case about
3 certificates, correct?

4 A. Certificates, no.

5 Q. Okay; I just want to make sure.

6 A. Okay.

7 Q. And you also stated on that date, do you
8 recall, that you wished you had had either the inspection
9 log or the little printout that they run on the
10 inspection, correct?

11 A. Correct.

12 Q. And you've had an opportunity to see the
13 inspection certificates in this case, haven't you?

14 A. I did, yes.

15 Q. Do you have that copy in front of you, the copy
16 that I'd given you?

17 A. I think I do, actually. Which one are you
18 referring to?

19 Q. I'm going to refer to May 20, 1997.

20 A. Yes, I have that.

21 MR. CSEHY: Your Honor, collectively for
22 identification purposes only, I believe I
23 stopped at State's 11 the last time. I would
24 like to just refer to it as State's Exhibit
25 12 for identification only. I do not intend

1 on tendering it.

2 THE COURT: Mr. Weintraub.

3 MR. WEINTRAUB: No objection.

4 THE COURT: No objection from the
5 defense.

6 Q. (By Mr. Csehy) Turn to that first page after
7 that certificate first and make sure we have the same
8 page. Is that the diagnostic test?

9 A. Yes, sir, at the top of it.

10 Q. You've looked at that, correct?

11 A. Sure.

12 Q. And that was done the same date as the
13 certificate was done; correct?

14 A. You're correct, May 20th. That's my birthday;
15 I remember it.

16 Q. Now, there's nothing on that certificate that
17 shows that any of the checks that they ran on it failed;
18 correct?

19 A. No, not according to the printout, no.

20 Q. And again, in the Keila Hatley case we didn't
21 have that. That was a problem. In this case we have it?

22 A. Right. I didn't see the card like this before.

23 Q. Right. So I'm saying this alleviates the
24 problem with the machine?

25 A. No, it doesn't alleviate the problem.

1 Q. It alleviates one of your concerns that we had
2 in the last trial?

3 A. Certainly. It was something I wanted to look
4 at; absolutely.

5 Q. Let's turn to the second page. You got the
6 second page there?

7 A. Yes, sir.

8 Q. That's called the difference test, correct, the
9 parameter test?

10 A. Yes, parameter, yes.

11 Q. And in this one the parameters test checked out
12 okay; correct?

13 A. It did; yes, sir.

14 Q. And the parameters, for purposes of the record,
15 it has to be within a .0200 of a difference?

16 A. Yes, sir.

17 Q. All right; turn to the next page. That's the
18 RFI test; correct?

19 A. Yes, sir.

20 Q. And apparently RFI was introduced and the
21 machine picked it up, correct?

22 A. Yes, sir.

23 Q. And it printed what it was supposed to print,
24 invalid test, inhibited RFI?

25 A. Yes, sir.

1 Q. And RFI means radio frequency interferent?

2 A. Yes.

3 Q. Next page, mouth alcohol test, right? You got
4 that?

5 A. Yes.

6 Q. Again, under subject's name it says mouth,
7 alcohol test?

8 A. Yes, sir.

9 Q. And when there's mouth alcohol detected the
10 slope detector picks it up and runs an invalid sample;
11 correct?

12 A. It does when it's detected, yes.

13 Q. And in this case it's invalid sample, XXX?

14 A. Yes.

15 Q. You can go to the next page to me. And for the
16 record we're still talking about May 20, 1997?

17 A. Correct.

18 Q. Less than one month before this test. Almost a
19 month to the day?

20 A. Yes.

21 Q. Now, this one, I don't know what you call it.
22 Is this the calibration check?

23 A. The calibration check, yes, sir.

24 Q. And what's required on that?

25 A. It's required that whatever is administered

1 into the chamber, which in this case I assume was a
2 0.100, it has to be within 0.005 plus or minus.

3 Q. And in fact, this machine actually came out a
4 little low, didn't it?

5 A. On this particular test, yes. But that's hard
6 saying because I don't know what the solution was. But
7 yes.

8 Q. I mean, you know the procedures. I mean, we're
9 talking about law enforcement officers here, correct, or
10 area supervisors?

11 A. Yes.

12 Q. And we're going to assume, for the sake of
13 argument, law enforcement officers all swear to uphold
14 the law. And when they sign the certificates they're
15 under oath, correct?

16 A. Sure; I assume so.

17 Q. We're going to assume being that Trooper Webb
18 asserted and affirmed this in the certificate under oath
19 that he performed it properly?

20 A. He performed it certainly according to the
21 rules, right.

22 Q. With the 0.10 solution?

23 A. Well, that's what he believed he introduced
24 into it. I don't know where he got the solution, but I'm
25 sure he did exactly what he was supposed to do.

1 Q. And that would bore it out, because this is
2 three-thousandths and five-thousandths of a point of a
3 point; correct?

4 A. Correct.

5 Q. And the last one is interferent simulator,
6 correct?

7 A. Right; interferent detected.

8 Q. I'm sorry; detected. And they naturally put an
9 interferent in there. And I believe you said yesterday
10 there might be two drops of acetone?

11 A. Well, that's my understanding, yes.

12 Q. Or it could be toluene or we don't know
13 exactly?

14 A. No. I know for a fact they don't use any other
15 chemical. All they use is acetone.

16 Q. Okay. They used acetone in this case and the
17 interferent screen picked it up?

18 A. It did; sure.

19 Q. I'm going to refer to what's in mass State's
20 Exhibit 13, Your Honor, which is the tickets for August
21 4, 1997, done, the inspection done less than a month and
22 a half after the arrest in this case.

23 MR. WEINTRAUB: I object to those
24 documents, Your Honor.

25 THE COURT: Let me let him finish. Is

1 there anything else you want to say on that?

2 MR. CSEHY: No, Your Honor.

3 THE COURT: Let's hear the objection.

4 MR. WEINTRAUB: I object to it because
5 if it's done two months later it has no
6 relevance as to how the machine was in June.

7 This earlier test has some relevance.
8 It was prior to the exam. The inspection
9 done later has no relevance as to how the
10 machine was doing in June if this later
11 inspection was done in August. The one done
12 in May has, I guess, some relevance. But
13 here you've got a two month gap, and if
14 you're going to keep going from that point
15 on, I don't know what that does to what the
16 machine was prior to those dates.

17 So my objection is it's irrelevant.

18 THE COURT: Okay. Are you going to be
19 able to show the relevance of that?

20 MR. CSEHY: Well, Your Honor, the law
21 requires quarterly inspections. The state of
22 Georgia is divided it into quarters, which is
23 January through March, April, May, June,
24 July, August, September, October, November,
25 December. Those are the quarters. The first

1 test we were just talking about was the
2 second quarter. It's the quarter immediately
3 preceding or the quarter of the test.

4 In order to be considered valid when
5 you put certificates in, the test has to be
6 performed quarterly, sometime anywhere in
7 between the quarters. This is showing simply
8 that after that, in the next quarter, this
9 inspection was done, which we would have to
10 comply with the statute, 392, in order for a
11 test to be valid. And I'm asking Mr. Slope
12 about these certificates; the same thing we
13 just went through --

14 THE COURT: You're just showing
15 consistency. Overruled, Mr. Weintraub.

16 MR. CSEHY: Thank you, Your Honor.
17 Again, I don't know if we have the same first
18 page here. Mine is the difference test. Is
19 that yours?

20 THE WITNESS: Right.

21 Q. (By Mr. Csehy) The difference test on this
22 one, again, has to be within a 0.02, correct?

23 A. Right.

24 Q. And the difference of the parameters test
25 worked out in this case?

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1 A. It did.

2 Q. Turn to the second page there, mouth alcohol.

3 A. Yes.

4 Q. Mouth alcohol, again, is a slope detector,
5 correct?

6 A. Yes.

7 Q. The high concentration of alcohol in the mouth
8 and the cilia, the throat?

9 A. Yes.

10 Q. That's why vomiting, regurgitation, belching,
11 the slope detector will pick that up, correct?

12 A. It should pick it up.

13 Q. And it picked up the mouth alcohol in this
14 case, correct?

15 A. Well, it did. There's reason for that,
16 obviously.

17 Q. Obviously?

18 A. Right. There's a reason that it picked up this
19 type of mouth alcohol, yes.

20 Q. Right. Because they put alcohol in the system?

21 A. Well, no, they put it in the mouth; they don't
22 put it in the system. There's a difference why the slope
23 detector only works a certain amount of time. So you
24 can't say that the mouth alcohol detector works. You can
25 say it's functioning based on what they put in. But the

1 concentration is so high that any machine can pick it up
2 that's meant for alcohol detection.

3 Q. Okay. And again, we don't know that the slope
4 detector wasn't working that night, correct?

5 A. No, we don't.

6 Q. Okay. And is it consistent, as it was with the
7 May 20th inspection?

8 A. Agreed.

9 Q. The next one, I see this is a calibration
10 check, correct?

11 A. Correct.

12 Q. This one is a little more dead on, correct, the
13 .099, .102, pretty close, really?

14 A. It's still close.

15 Q. You deal with thousands, I guess it is.

16 A. Sure. You have one below and one above.

17 Q. And so apparently that calibration check
18 checked out?

19 A. Sure.

20 Q. Again, we're going to assume that since Trooper
21 Webb is a law enforcement officer, sworn --

22 MR. WEINTRAUB: I don't know if we can
23 make that assumption, Your Honor. I object
24 to that. I didn't object to it the first
25 time. I object to him making an assumption.

1 He has no basis for that assumption. My
2 client took an oath. Are we going to make an
3 assumption -- is the state willing to assume
4 that everything he said is true unless they
5 have --

6 MR. CSEHY: I'll withdraw.

7 THE COURT: He withdraws the assumption.

8 MR. WEINTRAUB: And I'll move to also
9 strike the earlier assumption that was made
10 with the earlier oath that Trooper Webb took.
11 If he wants to talk about his oath, let him
12 come in here and tell that to you, Your
13 Honor. So I object to the earlier one and
14 ask that the record be stricken on that.

15 THE COURT: Well, I don't know about the
16 earlier one. But he's withdrawing the
17 assumption on this one.

18 MR. CSEHY: Thank you, Your Honor. Do
19 you have the diagnostic test there?

20 THE WITNESS: Correct.

21 Q. (By Mr. Csehy) And that runs a problem check,
22 correct?

23 A. Right.

24 Q. Georgia uses what they call the EEPROM?

25 A. Correct.

1 Q. And you can get different proms?

2 A. Sure.

3 Q. I mean, if you have a company, you don't get
4 the Georgia State Patrol EEProms?

5 A. No.

6 Q. And all it is, for the Court's own edification,
7 it's just like a memory, just like Windows is for
8 computers?

9 A. Basically.

10 Q. And it's a specific program designed for law
11 enforcement?

12 A. Right.

13 Q. And the RAM check, you've got to make sure the
14 memory is working properly?

15 A. Yes.

16 Q. And the temperature check, make sure the
17 temperature is working properly?

18 A. Right.

19 Q. The processor, that runs the motor. And again,
20 the EEProm, make sure we have the serial numbers; that
21 all the numbers on the components match up?

22 A. That's correct.

23 Q. Range and stability, auto calibration status,
24 you check that.

25 A. Right.

1 Q. RTC, what is RTC?

2 A. Basically, it's a check of the internal rotor
3 and those types of things inside the machine. There's a
4 filter wheel inside of the machine and you check that
5 also.

6 Q. The filter wheel is what pumps out -- what
7 filters it through -- is that the one that pumps the
8 lighting into the chamber?

9 A. Well, actually, the filter wheel is what
10 discerns how much light goes through. That's what it
11 does.

12 Q. And if there's too much light that goes through
13 or not enough light, that's going to cause a problem on
14 the machine?

15 A. Exactly.

16 Q. So the RTC checked out in this case?

17 A. Right.

18 Q. Internal standards.

19 A. Yes.

20 Q. Passed. And of course it runs a diagnostic on
21 its own diagnostic system?

22 A. Right.

23 Q. It's like a doctor checking a doctor?

24 A. Basically, right.

25 Q. And, of course, the printer check?

- 1 A. Yes.
- 2 Q. It prints out all the letters and the numbers?
- 3 A. Correct.
- 4 Q. And legible to read on this one; correct?
- 5 A. Correct.
- 6 Q. I believe the last one is interferent again?
- 7 A. Correct.
- 8 Q. Put an interferent in the system and see if it
- 9 checks out.
- 10 A. Right; acetone.
- 11 Q. So the interferent picked up the acetone?
- 12 A. Correct.
- 13 Q. But from this, you could say, as opposed to the
- 14 Keila Hatley case, it's a little better shape to this
- 15 point, a little more information?
- 16 A. More information, absolutely.
- 17 Q. Let me ask you, the certifications for the
- 18 Intox 5000, right?
- 19 A. Right.
- 20 Q. A different series: 64, 65 and 68; is that --
- 21 A. 66 and 68, 64 also.
- 22 Q. But you don't hold the Georgia certification?
- 23 A. No; I never have. Only law enforcement
- 24 officers are people appointed by the state to hold the
- 25 criminal certification. In other words, you can't even

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1 get one unless the state allows you to.

2 Q. I understand. Now, I mean, what they'll do is
3 like defense attorneys or anybody, and then they'll have
4 seminars where you can "certify" like manufacturer
5 certification?

6 A. Well, sort of, yes, they have those. I work in
7 some of those seminars. Although I really don't do the
8 certification, we have others that do that. I just teach
9 part of the course.

10 Q. Let me ask you. You said yesterday there might
11 be parts missing. Let me ask you, I mean, if the breath
12 tube is missing from the machine, if it's detached, there
13 is a breath tube --

14 A. Right.

15 Q. Any breath tube?

16 A. Sure.

17 Q. If that's missing or detached, we're not
18 getting a test, correct?

19 A. No.

20 Q. And, I mean, when you hear the machine -- I've
21 taken one apart myself -- but you can hear the machine.
22 I don't know if you know it -- we haven't done what
23 you've done, but you probably would agree with the
24 statement that if the fan is not working you'd probably
25 hear that?

1 A. Sure.

2 Q. And if the air pump is not working that expels
3 from the chamber, that makes like a tire pump sound?

4 A. Yes. To me it sounds like a crane.

5 Q. S-h-h?

6 A. Sure.

7 Q. So Trooper Puckett could certainly testify that
8 it all appeared to be working, at least where he could
9 hear it?

10 A. Sure.

11 Q. So we know at least -- and you heard him say
12 that everything appeared to be working properly --

13 A. He did.

14 Q. That he could detect. So we know that the
15 keyboard obviously was plugged in?

16 A. Right; that was working.

17 Q. And the tube was working?

18 A. Right.

19 Q. And the tube was probably heated because he has
20 to actually touch the tube.

21 A. Well, I can't tell you if the tube is heated.
22 It's supposed to be; he didn't say it was heated.

23 Q. But he said it all checked out okay?

24 A. That's what he said.

25 Q. And we can assume then that the fan was working