

51,56,58

1 IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT IN
2 AND FOR CHARLOTTE COUNTY CRIMINAL ACTION

3
4 STATE OF FLORIDA,

5 Plaintiff,

6 vs.

CASE NO. 94-183-TT

7 EDWARD CROSS,

8 Defendant.

9
10
11 TRANSCRIPT OF PROCEEDINGS

12 (Motion to Suppress Hearing)

13 Before the Honorable Kenton Haymans, County
14 Judge, at a hearing held in the above-styled action
15 at the Charlotte County Courthouse, Punta Gorda,
16 Florida, on the 19th day of December, 1994.

17 APPEARANCES:

18 IAN MANN, Assistant State Attorney,
19 20th Judicial Circuit, Punta Gorda, Florida 33950;
20 appearing on behalf of the Plaintiff.

21 DAVID MIGNEAULT, Attorney at Law,
22 Punta Gorda, Florida 33950; appearing on behalf of
23 the Defendant.

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1 used to trained all the instructors. I used to
2 provide teaching to the intoxilyzer operator, which
3 I haven't done in about three years. But I did
4 write the manual. Testify in court.

5 Q What degrees do you hold, sir?

6 A I hold a Bachelor's of Science in
7 Biochemistry which was obtained at the University of
8 Wisconsin in Madison in 1975.

9 Q Are you a member of any professional
10 organizations?

11 A Yes. I'm a member of the National
12 Safety Council Committee on alcohol and other
13 drugs. Also the International Association for
14 Chemical Testing.

15 Q That National Safety Council Committee
16 that you are on, how many members are on that
17 committee?

18 A About a hundred members of which there
19 are numerous meritorious members.

20 Q Where are they from?

21 A All over the country and some from
22 overseas.

23 Q What about the background of the people
24 on that committee?

25 A All are asked to become members because

1 of their expertise in the field of alcohol analysis
2 and interpretation and enforcement from the legal
3 and medical profession and scientific professions.

4 Q Let me ask you: How many years now have
5 you been involved in any type of breath testing
6 equipment, evaluation?

7 A Close to thirteen, fourteen years.

8 Q Do you recall how many different times
9 your involvement has been involved in testing during
10 that period?

11 A Most of them.

12 Q Just a brief list, if you could please?

13 A Yes. Breathalyzer Model 900, 900-A,
14 Intoximeter 3000, Intoxilyzer 4011 and Intoxilyzer
15 5000, Alco Sensor two and three and four, the Alco
16 Analyzer 2100. And there are several others.

17 Q All right. With regard to the
18 Intoxilyzer 5000, what about that one?

19 A That one and other variations as well.
20 I've worked with the Intoxilyzer 5000 and I've work
21 with other versions but primary that 5000.

22 Q How many years were involved in testing
23 the Intoxilyzer 5000?

24 A Ten.

25 Q What are some of the tests that you

1 conducted on the Intoxilyzer 5000?

2 A During the initial evaluation phase in
3 1994, I tested the accuracy and the precision of the
4 effect of substances other than alcohol on the
5 instrument, how to detect mouth alcohol substances.

6 Subsequent to that time I have tested it
7 against the effect of mouth alcohol, chewing tobacco
8 spiked with alcohol, cough drops, pretty much all
9 the breath sprays, including Primateen Mist and
10 breath fresheners, sprays.

11 Anything that either has been raised as
12 a challenge to the instrument or I think might be
13 raised as a challenge to the instrument.

14 Q Do you know the manufacturer of the
15 Intoxilyzer instrument?

16 A Yes.

17 Q Who is that?

18 A The C.M.I., Owensboro, Kentucky. It was
19 the Federal Signal Corp. and the original factory
20 was in Minturn, Colorado.

21 Q Have you received any training or
22 instruction on the functioning of the instrument
23 from the factory?

24 A Yes.

25 Q When was that?

1 A 1985, I believe from the factory, yes.

2 Q And what did that instruction encompass?

3 A That was a trip to the factory with
4 representatives and myself and representatives from
5 the state patrol that ran the breath test program.
6 It was primarily to see how the instrument was
7 manufactured and the basic principles of the
8 instrument, the engineering that designed it and
9 learned how to prepare it.

10 Q You best estimate, sir, how many
11 different samples have you run through the
12 Intoxilyzer 5000?

13 A In the thousands. I'm not really sure,
14 in the thousands.

15 Q Have you done any published studies with
16 regard to that intoxilyzer or any other breath
17 instrument?

18 A Yes.

19 Q Do you have the name -- what journals
20 are the studies published in?

21 A All three were published in the Journal
22 of Forensic Sciences.

23 Q Do you recall the types of those
24 published studies?

25 A Probably not word for word, but one of

1 them is a breathalyzer accuracy. And dealing with
2 its us in actual law enforcement practice.

3 Q What about the intoxilyzer?

4 A Field performance of the I believe the
5 Intoxilyzer 5000.

6 Q What was the substance of that
7 publication, what were you studying there?

8 A It was a study of how the intoxilyzer
9 compared to blood results taken in the field,
10 actually blood samples and breath samples from drunk
11 drivers. And --

12 Q What about the -- is there something
13 else on that?

14 A Yes.

15 Q Continue please.

16 A It came about in our state that either
17 the officer or the arrested subject can request
18 an additional test. And in those instances where
19 the intoxilyzer generally was taken first, one of
20 the parties asked a second test be taken of that
21 blood coming into our laboratory.

22 On our form we've a place for the
23 officer to record the intoxilyzer results and it
24 came in with that data taken within an hour of each
25 other.

1 Q The third publication was the most
2 recent?

3 A In 1992, one was on the effect of
4 dentures and dental adhesives on mouth alcohol
5 retention.

6 Q Could you tell us how you set up that
7 study?

8 A It was set up by recruiting twenty-five
9 denture-wearing subjects. We had them come into our
10 dentist's office or our laboratory, depending on
11 where we were working that day. The intoxilyzer was
12 present to test them. We asked them to remove their
13 dentures first.

14 First of all, we test them to make sure
15 they have no mouth alcohol. They are told to remove
16 their dentures, they are given one ounce of
17 eighty-proof brandy and to hold that in their mouth
18 and swish it around for two minutes and spit it
19 out.

20 And then we tested them on the
21 intoxilyzer until there were no readings or
22 indications of any alcohol present.

23 Once that happened we had them put them
24 dentures back loosely in their mouth and put in
25 again an ounce of eighty-proof brandy and for two

1 minutes hold that in their mouths and work it in and
2 under, swish it and try to trap it underneath the
3 dentures, spit it out, and at this time test them
4 down to zero again.

5 And we assigned one of fifteen dental
6 adhesives to the subjects and had them apply the
7 adhesives to the dentures in their mouth, give it a
8 minute for the adhesives to set up, and repeated the
9 procedure.

10 MR. MANN: Before I get into the
11 results of that study I'm assuming Mr.
12 Migneault is going to voir dire the
13 witness as to his credentials, and I would
14 offer him that opportunity.

15 MR. MIGNEAULT: Not at this time,
16 Your Honor.

17 THE COURT: Proceed.

18 Q Mr. Harding, in regard to your study on
19 the effect of dentures and denture adhesives on the
20 mouth and alcohol retention times, what were your
21 findings, sir?

22 A That dentures and dental adhesives does
23 not increase mouth alcohol retention times beyond
24 what is normal, which is fifteen or twenty minutes.

25 Q How many subjects participated in that

1 study?

2 A Twenty-five.

3 Q Did any of them show any mouth alcohol
4 retention beyond twenty minutes?

5 A Yes.

6 Q How many?

7 A Two.

8 Q Please describe those two individuals.
9 Please start with --

10 THE COURT: How many did you test
11 again?

12 THE WITNESS: Twenty-five.

13 Q Go ahead. The first of those individuals
14 that retained alcohol for more than twenty minutes,
15 can you describe what you recall of what adhesives
16 he was using and what it was followed with?

17 A The adhesive that was used was C-Bond.
18 It's a paper wafer essentially. You are supposed to
19 cut it to the size of your dentures and dip it in
20 water and it has adhesives impregnated in it.

21 He had a partial upper and a one-tooth
22 partial lower. And we had him put that C-Bond
23 adhesive on the lower dentures. And after
24 completing that he said that it felt like his
25 dentures were floating and it raised them high away

1 from his gums.

2 He had a residual reading at I believe
3 twenty-eight minutes but they were trace readings
4 below .01 for that period of time.

5 Q Do you recall the period of time or
6 remember the first reading that you obtained from
7 this individual?

8 A I don't recall exactly what the reading
9 was.

10 Q Is there anything that I could show that
11 would refresh your recollection?

12 A You could show me a copy of the paper or
13 I have a copy of it up here (indicating). The first
14 reading in which he was in the dentures and adhesive
15 condition was about .05.

16 Q And what was the pattern of the
17 retention in his breath reading over the following
18 minutes?

19 A That reading was at fourteen minutes.
20 At fifteen minutes he was at -- that reading was .03
21 at fourteen minutes. At fifteen minutes it was
22 .02. And seventeen minutes and eighteen minutes it
23 was .01.

24 Then at twenty-one minutes to
25 twenty-eight minutes that dropped below .01 to about

1 .005 or .007 or .008, down to zero at twenty-eight
2 minutes. Between twenty-six and twenty-eight
3 minutes he went down to zero.

4 Q Let me back you up to when you were
5 setting up this study. What was your goal in
6 designing the program in terms for what you're going
7 to do here?

8 A Our goal was to, first of all, get a
9 baseline by having the subjects remove their
10 dentures, to just have the oral cavity with no
11 appliances in it. And the goal beyond that was to
12 get an effect, to try to get alcohol to be trapped
13 in the dentures or trapped by the dentures in the
14 mouth and to try to show alcohol reading beyond
15 twenty minutes.

16 Q Are you looking for that worst case
17 scenario, trying to get it to last more twenty
18 minutes?

19 A Yes. People don't hold eighty-proof
20 brandy in their mouth for two minutes. That's not
21 natural.

22 Q Even this one individual who retained
23 alcohol for longer than twenty minutes, how long did
24 he go?

25 A Twenty-eight.

1 Q And at twenty minutes what was the
2 reading that he was displaying?

3 A .01, zero one.

4 Q There was one other subject in your
5 study who registered a type of reading after twenty
6 minutes; that's correct?

7 A Yes.

8 Q Do you remember anything specific of
9 that individual?

10 A Yes. At twenty minutes and twenty-one
11 minutes he was reading .01 also. And we didn't test
12 him again until twenty-three minutes and it was down
13 to zero by that time.

14 It was a denture plus adhesive condition
15 and he was using one of the powdered formulations.
16 I think it was Coreiga powder.

17 Q Mr. Harding, let me ask you about this
18 possibility. These people that were registering
19 trace amounts after twenty minutes, if an individual
20 had consumed alcohol prior to rinsing it out in your
21 mouth, is it possible that the results that you
22 might have obtained from that person would be a
23 combination of alcohol in their mouth plus what
24 might be a deep lung sample blood-alcohol reading?

25 A Not to any true alcohol blood reading.

1 Q How would do that?

2 A You have to have enough mouth alcohol or
3 more than that, your true breath alcohol
4 concentration, in order for it to be additive.

5 Q In your example that mouth alcohol, if
6 you registered it, would not be the true reflection
7 of what the person's breath alcohol reading was?

8 A If the true breath alcohol reading was
9 .01 the mouth alcohol would have to be a .11. It
10 couldn't be a .01 and increase to .11, that's in
11 addition to the alcohol that's already there.

12 Q What was the highest concentration of
13 mouth alcohol that you had anyone display after
14 twenty minutes?

15 A I believe it was .18.

16 Q After twenty minutes?

17 A I'm sorry. Excuse me. After twenty .01
18 was the highest.

19 Q After twenty minutes what's the highest
20 possible reading that you might get on that person
21 that could even possibly be reflected as a
22 combination of mouth and breath alcohol?

23 A .01. All that I could do since there
24 was no alcohol in their blood, take that person and
25 get an a .01 reading.

1 Q Why is the breath alcohol reading going
2 to register -- strike that.

3 Why is it that for the mouth alcohol
4 reading to register inappropriately it has to be
5 higher than the breath alcohol?

6 A Alcohol distributes throughout the body
7 waters. There is alcohol where there is waters, and
8 that includes saliva. The the saliva is going to
9 reflect that higher measure of saliva itself that is
10 evaporating into the mouth. That's no different
11 from alcohol coming from the lung alveolar alcohol
12 ratio. For that to increase the true reading it has
13 to be above and beyond that to increase that true
14 reading.

15 Q Let me ask you about this: Let's
16 discuss some of the features of the Intoxilyzer 5000
17 and the way a test is conducted in the field.

18 Are you familiar with the phrase slope
19 detector?

20 A Yes.

21 Q What is a slope detector in that
22 context?

23 A A slope detector is software that
24 interprets the reading that the instrument takes
25 when you start blowing into the instrument at the

1 appropriate pressure.

2 The instrument takes a reading every
3 six-tenths of a second and compares one to the
4 other. It expects to see a certain pattern. That
5 pattern is one in which that breath alcohol
6 concentration rises fairly rapidly and then reaches
7 a level or a plateau.

8 Q Could you draw a visual representation
9 of that, doing a graph of normal blood-alcohol for
10 us, please.

11 A Yes. (Witness approaching the
12 blackboard.)

13 Q You can erase that if you want.

14 A It looks something like this when you
15 first start blowing into it, and this is maybe ten
16 seconds or so. After that it starts its leveling
17 off there. The instrument is designed to detect
18 somewhere around in this area from about here on
19 up.

20 As soon as it starts to level off so I
21 don't get plus .002. As long as it's more than .002
22 it expects that you continue to blow. After that it
23 will allow to you stop.

24 Q Once the value stops changing more than
25 .002 it says that's enough and stops taking the

1 sample?

2 A It doesn't tell you that. It instructs
3 you to blow as long as you can and to stop after
4 that period. It will not go back and tell you to
5 continue to blow.

6 Q Can you do the type of mouth alcohol
7 sample, what it would look like and do that?

8 A Yes. The instrument expects when you
9 start to blow in it that you're getting essentially
10 room air, that's room air, dead air that's in your
11 mouth has little or no alcohol.

12 Then when you breathe the mouth alcohol,
13 the first thing that it sees is that high alcohol
14 concentration originating from the mouth with that
15 dead space of lungs. It's going to spike up rapidly
16 and then and drop off and get down to the true
17 breath alcohol reading.

18 When it is spiked and followed by a drop
19 it, again in Wisconsin, within a minus .001, is the
20 drop that it's looking for. It triggers the mouth
21 alcohol, flags it on the instrument.

22 Q Mr. Harding, in your opinion, when the
23 Intoxilyzer 5000 printout on the result card flags
24 something as mouth alcohol, what is that?

25 A Mouth alcohol.

1 Q Does the absence of that mouth alcohol
2 flag indicate the absence of mouth alcohol?

3 A No, not in and of itself.

4 Q Why?

5 A The slope detector used as a mouth
6 alcohol detector is not perfect. We won't be able
7 to get any results in the study if that was the
8 case.

9 Q Why is that, sir?

10 A I'm not exactly sure. It can be fooled
11 and I can't really tell you why. It doesn't seem to
12 have any particular rhyme or reason. When some
13 people blow they have no alcohol and residual mouth
14 alcohol to trip the slope detector and it is able to
15 level it out. That didn't detect a mouth alcohol
16 and it that won't accept a reading.

17 Q In your experience, have you seen
18 individuals whom you know had not ingested alcohol
19 and had just mouth alcohol and you got a reading
20 that was not indicated as mouth alcohol?

21 A Yes. All twenty-five of my subjects in
22 the published study and in addition from the various
23 demonstrations.

24 Q How is that we can trust the validity of
25 a result on a breath card if the slope detector can

1 be fooled?

2 A It's the least important way to detect
3 mouth alcohol in a breath test. The primary ways
4 are a twenty-minute observation deprivation period
5 where they are not ingesting any alcohol or
6 regurgitating any stomach contents which may contain
7 alcohol. And in addition, two breath tests that are
8 within .02 that were was taken within ten minutes
9 apart.

10 Q If somehow -- we've already talked about
11 what happens to these people with dentures in a
12 twenty-minute period. You had two subjects that
13 made it with basically trace amounts beyond twenty
14 minutes.

15 Let's assume that somebody screwed up on
16 the twenty-minute observation period, that a person
17 who's going to throw a quick shot in his mouth and
18 spits it out or even swallows it, of course, if he
19 blows at the end of the twenty minutes, what are the
20 two samples going to look like?

21 A If alcohol is consumed less than twenty
22 minutes prior to the test it's going to look like
23 that first breath sample. It's going to be more,
24 higher than that second breath sample if it gets by
25 the slope detector.

1 Q Assuming that person doesn't even
2 consume any alcohol, it was just in his mouth, what
3 kind of different results are you going to see
4 between the first and second breath sample?

5 A It depends on how much alcohol was
6 there, how much time elapsed from the time that he
7 spit it out or swallowed it.

8 Q Again, it would be within .02 of each
9 other?

10 A No, no.

11 Q Mr. Harding, have you had an opportunity
12 to review any documents pertaining to the
13 intoxilyzer presently operating in Charlotte County
14 that I sent you?

15 A Yes.

16 Q What were the documents that you
17 reviewed?

18 A Intoxilyzer test records and intoxilyzer
19 test log for the instrument that was used to produce
20 that test record, and various other documents
21 pertaining to certificates and inspections, things
22 of that nature.

23 Q Based on your experience with the
24 intoxilyzer, and your review of those documents,
25 were you able to form an opinion as to whether or

1 not the instrument represented in that document was
2 operating properly in January 15th of this year?

3 A Yes.

4 Q What was that opinion?

5 A That it was.

6 Q I place before you, Mr. Harding, State's
7 Exhibit Two for identification. Have you ever seen
8 one of those?

9 A Yes.

10 Q What is that?

11 A Intoxilyzer test records.

12 Q What are the two results?

13 A There are two subject test results on
14 this, .0270 at 2143, and .258 at 2146.

15 Q Let me pose a hypothetical to you. The
16 individual represented on that breath card was
17 observed for twenty minutes before they blew into
18 the machine, was not seen to regurgitate or ingest
19 anything, and had been in custody for at least half
20 an hour to an hour before that and did not consume
21 alcohol during that period.

22 Can you form an opinion as to could any
23 reflection of those results be any portion of mouth
24 alcohol?

25 A Yes, I can give you that opinion.

1 Q What that is that opinion?

2 A That mouth alcohol did not contribute to
3 any of these readings.

4 Q How can you make that assertion, sir?

5 A Based on studies that I have done on
6 mouth alcohol retention and the physiological
7 principles on residual mouth alcohol and the way the
8 instrument operates.

9 MR. MANN: No further questions for
10 this witness at this time.

11 CROSS-EXAMINATION

12 BY MR. MIGNEAULT:

13 Q Mr. Harding, first let's go over your
14 testimony. We previously heard testimony from
15 Bernard Justice who testified under oath that it is
16 impossible, that you cannot fool the Intoxilyzer
17 5000 slope detector; isn't that an accurate
18 statement, sir?

19 A No.

20 Q In fact, you have fooled that
21 Intoxilyzer slope detector on all twenty-five of
22 your test subjects; isn't that correct?

23 A Yes.

24 Q And that, in fact, the highest reading
25 that you got while doing at that was .18 on an

1 individual that had no alcohol in their blood; was
2 that correct?

3 A Yes.

4 Q Also, sir, pursuant to your studies,
5 nine out of twenty-five registered a reading after
6 fifteen minutes; is that correct?

7 A Yes, that's correct, that's true, yes.

8 Q Again, even though they did not have a
9 blood reading or blood-alcohol level from ingesting?

10 A Right.

11 Q And two of those twenty-five even had an
12 alcohol reading up to twenty-eight minutes after the
13 initial start of the drinking; isn't that correct?

14 A Only one.

15 Q And the other one of twenty-one minutes?

16 A Right.

17 Q Approximately seven to eight percent of
18 your test subjects went beyond the twenty-minute
19 time period?

20 A That sounds right.

21 Q And approximately forty to fifty percent
22 of the assessed subjects had alcohol readings beyond
23 fifteen minutes?

24 A More like forty.

25 Q Is that correct?

1 A Yes.

2 Q You state now that you can't, according
3 to the State attorney's questions, you wouldn't have
4 more of a .02 variance in that individual that would
5 have a mouth alcohol; in other words, no .02
6 correlation between the two over a period of time;
7 is that correct?

8 A You have to repeat the question.

9 Q The State attorney asked you that if
10 somebody blows in the machine and they blow again
11 with mouth alcohol present, would there be a greater
12 variance?

13 A Yes, you have to.

14 Q Your testimony is that it is greater
15 graduate than .02 variance?

16 A That's correct.

17 Q The individuals that you tested at least
18 on the two graphs that I see on your studies, one
19 individual was .02 from eighteen minutes all the way
20 to approximately twenty-three -- it appears to be
21 twenty-six minutes.

22 A It was .01.

23 Q I'm sorry, .01?

24 A Right.

25 Q That .02 is an agreement in that time

1 period when you ran him?

2 A No.

3 Q That's not at that .02 agreement?

4 A No, it's not.

5 Q Okay. Did you run him at the
6 eighteen-minute mark?

7 A Yes.

8 Q Did you run him at any time during that
9 time period after that?

10 A Yes.

11 Q When was that?

12 A It was 21, 22, 25, 26 minutes.

13 Q What were his readings?

14 A .01 and less.

15 Q And was the reading at .01 correct?

16 A Right.

17 Q It is not greater between the first and
18 the second reading?

19 A Not in that case, no.

20 Q When you previously testified that you
21 wouldn't have a .02 agreement, you were mistaken?

22 A No.

23 Q There is a .02 agreement in that case?

24 A No. The question I was answering had to
25 deal with the real world, a real individual that had