

IN THE COUNTY COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

COPY

STATE OF FLORIDA,

vs.

CASE NO.: 97-026411MM10A
JUDGE GINGER LERNER-WREN

TRACY INTORCIA,
Defendant.

_____ /

Fort Lauderdale, Florida
April 14, 1998
Courtroom 510

TESTIMONY OF RICK SWOPE

The above-entitled case came on for hearing
before the Honorable GINGER LERNER-WREN, Presiding
Judge, at Broward County Courthouse, Fort Lauderdale,
Broward County, Florida, on the 14th day of April
1998, at 8:30 a.m.

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APPEARANCES:

OFFICE OF THE STATE ATTORNEY
By: Eduardo Meire, Assistant State Attorney,
appearing on behalf of the State.

Lloyd Goldburgh, Esq.,
appearing on behalf of the Defendant.

- I N D E X -

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Rick Swope				
by: Mr. Goldburgh	3		43	
by: Mr. Meire		28		46

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Whereupon,

The following proceedings were had:

THE COURT: Defense, please call your first witness.

MR. GOLDBURGH: Defense calls Mr. Rick Swope.

Thereupon,

RICK SWOEP

was called as a witness and after first being duly sworn by THE CLERK answered and testified as follows:

THE WITNESS: I do.

THE CLERK: You may be seated. State your full name, and spell your last name for the record.

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

DIRECT EXAMINATION

Q (BY MR. GOLDBURGH) Good morning, Mr. Swope.

A. Good morning.

Q. What kind of work do you do?

A. I do primarily accident reconstruction.

That is ninety percent of my business. And the other ten percent of my business deals with consulting on

1 cases pertaining to Breathalyzer, intoxilyzers, and
2 field sobriety exercises.

3 Q. What is it that qualifies you to consult and
4 deal with issues regarding intoxilyzers,
5 Breathalyzers, and field sobriety exercises?

6 A. Well, as a police officer for fifteen years
7 I have been doing breath testing or working with
8 breath testing devices since 1974.

9 I last worked in 1990. I do still maintain
10 a lot of work with intoxilyzers. I maintain them for
11 private industries, or firms.

12 I do a lot of experimentation work with
13 them. I have published articles, and have done
14 scientific experiments with breath testing devices.

15 I am an instructor for the state of Florida.

16 Q. What do you instruct on?

17 A. I have instructed in the area of field
18 sobriety exercises as well as breath testing. How to
19 give breath tests. How to do maintenance on the
20 machine. How to take them apart, and do minor
21 repairs. Do those types of things.

22 I am an instructor for the National Highway
23 Safety Administration, which is a branch of the
24 federal government Department of Transportation. I
25 hold permits in the state of Florida.

1 Q. You taught? Have you taught?

2 A. I have taught quite a bit.

3 Q. Have you taught others with respect to
4 issues concerns the Intoxilyzer 5000, and also field
5 sobriety exercises?

6 A. Yes.

7 Q. Who have you taught?

8 A. Well, I taught primarily at one time police
9 officers. I still currently do some teaching. I have
10 taught over 3,000 police officers in all 50 states.

11 I have published articles and outlines as
12 indicated before. I have done research in both of
13 those fields with breath tests and field sobriety
14 exercises.

15 And I hold a permit to teach for the state
16 of Florida.

17 Q. You testified that you have run experiments
18 yourself. Have you run experiments with the
19 Intoxilyzer 5000?

20 A. Yes.

21 Q. What kind of experiments?

22 A. Well, the experiments are basically run in
23 several different types of fields. That would depend
24 on what we are looking for.

25 I run experiments dealing with the software

1 the -- the reliability, accuracy, the mechanical
2 functions, or what is known as error functions with
3 the machine.

4 That means there are certain things the
5 machine will pick up, and will let the maintenance
6 operator know there is a problem.

7 I have run experiments in those fields when
8 they work, when they do not work, and what the problems
9 are with the machine.

10 What is good about the machine. What is
11 accurate, those types of things, and blood breath
12 correlations.

13 Meaning that people are given measured
14 amounts of alcohol. We give them measured amounts of
15 alcohol, and we test them at different periods of time
16 and separate the females from the males, and separate
17 them by race, age those types of things.

18 And we say exactly what their breath alcohol
19 level is based on formulas that we use, and what the
20 result shows, and what the blood may show versus what
21 the machine shows.

22 Q. Are you saying that in your experiments you
23 have actually given human beings doses of alcohol --
24 certain known concentrations of alcohol?

25 A. Yes.

1 Q. And then also administered breath tests to
2 them--

3 A. That is correct.

4 Q. -- in that setting?

5 A. Yes.

6 Q. Were you also observing their physical
7 characteristics in addition to administering a breath
8 test?

9 A. Yes.

10 Q. How many of these experiments have you done
11 or participated in?

12 A. Well, I have done probably somewhere in the
13 neighborhood of probably 50 to 60 people myself. I
14 have been present when another couple of hundred
15 people have been done.

16 In other words, when you do an experiment
17 there are several people involved with you. You
18 cannot do it all yourself.

19 Either I was a part of it, kept the logs or
20 dosed the people. So it had been several hundred. A
21 few hundred. A lot.

22 Q. You have been around breath testing
23 equipment since 1974. How long you been around the
24 Intoxilyzer 5000?

25 A. Since they first came out. That would be --

1 it was either late '84 or like January or February of
2 '85.

3 Somewhere in that ballpark. I saw the
4 machine first, but I did not touch it until January or
5 February of '85.

6 Q. Thirteen of fourteen years ago?

7 A. Yes.

8 Q. Were you a member of BSO?

9 A. Yes. I was.

10 Q. You were a deputy?

11 A. Yes.

12 Q. Did you have anything to do with the Broward
13 Sheriff's office breath testing program?

14 A. Yes.

15 Q. You were involved in that?

16 A. I was.

17 Q. For how long a period of time?

18 A. From 1984 to 1990.

19 Q. Now, tell me about your experience with
20 field sobriety exercises.

21 You told us before that you teach or have
22 taught, and still teach others on how to do what,
23 administer them?

24 A. Yes. Administer them and evaluate them.

25 Q. There are two functions?

1 A. Yes.

2 Q. Have you done any experiments -- I know you
3 said earlier you dosed humans with alcohol and
4 observed them physically.

5 Have you done experiments with field
6 sobriety exercises also?

7 A. Yes.

8 Q. Can you explain a little bit how you have
9 done that?

10 A. Well it is the same thing. Field sobriety
11 exercises are done in different categories, and the
12 articles I wrote dealt with the police academy.

13 And volunteers are brought in -- we usually
14 do not have trouble getting volunteers -- we have
15 volunteers come in, and we separate them by male and
16 female, and we ask for a drinking history.

17 Some people drink a lot. Some do not. We
18 split them into groups. We want the -- the goal is to
19 see how individuals perform at certain levels of
20 alcohol.

21 In other words, can a person who has been
22 drinking, can they pass a certain exercise? Or a
23 person that has five drinks can they pass an exercise?

24 Anyway, we break that down into all kinds of
25 different formats as to what we call the difficulty of

1 the test, difficulty of exam, and we break it down by
2 other functions, but that is really where we start.

3 Q. Yesterday Deputy J. Zagar, who is in charge
4 of the breath testing program in Broward County took
5 the witness stand and testified as to the subject of
6 absorption and elimination.

7 Are you familiar with that topic?

8 A. Yes.

9 Q. Can you describe it briefly, what does it
10 mean?

11 A. Absorption very simply is when alcohol is
12 taken -- obviously it is taken into the system into
13 the stomach.

14 It takes a period of time to be absorbed
15 into the blood stream to where it begins to affect
16 you.

17 If I drink, and have a complete beer in
18 front of the jury, it takes time to get in my system.
19 It is not affecting me at that point.

20 It takes a period of time to get absorbed,
21 and get into the system.

22 Elimination is the reverse of that. After
23 it is in the system, it takes a certain period of time
24 for the alcohol to eliminate.

25 And there are various ways of elimination.

1 It would be done through time, which is probably the
2 most logical one.

3 People, who vomit, alcohol can be eliminated.
4 People that go to the bathroom. There are different
5 ways that alcohol can be eliminated from the system.
6 So absorption and eliminations is the reverse of each
7 other.

8 Q. When you are absorbing, it is going from
9 your stomach into your blood. When you are
10 eliminating, your system gets rid of it through your
11 liver, or skin, or other ways that you mentioned?

12 A. A variety of ways. Yes.

13 Q. Have you ever read any studies by any of the
14 leading experts in this field dealing with alcohol
15 metabolism on human beings and the topic of absorption
16 versus elimination?

17 A. Yes.

18 Q. How many?

19 A. I do not know.

20 There are probably -- I have read probably a
21 few hundred over the past twenty some years.

22 Primarily what I consider to be a few authors that are
23 really into it, and they are noted authors.

24 Q. Who are they?

25 A. Kurt Dubowski would be one. Dr. Jensen out

1 of Minnesota would be another. There is an individual
2 named Smith, Cole. Those are the main people that I
3 read articles about.

4 Q. Do you consider them experts in the field?

5 A. Sure.

6 Q. Mr. Swope, based on the research that you
7 have done, and the studies that you have read, do you
8 know what the experts say the average rate of
9 absorption is for human beings?

10 A. Yes.

11 Q. What is it?

12 A. The average rate is 30 minutes to 114 .

13 Q. Does that mean from the time the person
14 stops drinking alcohol you have approximately an
15 average of 30 minutes to 114, before they start
16 absorbing it into the blood?

17 A. That is correct.

18 Q. If you were given a breath -- the test
19 result taken at a particular time, and you also were
20 given an approximate time that no more drinking was
21 being done -- let me give you a hypothetical.

22 A person comes into contact with law
23 enforcement at approximately one o'clock. So you have
24 to assume that there is no drinking after one o'clock?

25 A. I would agree with that. Sure.

1 Q. Then at approximately 2:26 a person takes a
2 breath test.

3 A. Okay.

4 Q. The results of that breath test are a .19?

5 A. Okay.

6 Q. That is approximately how much time?

7 A. Well obviously an hour and 26 minutes.
8 Almost an hour and a half.

9 Q. If that is all you knew, would you know
10 whether this person was absorbing alcohol or
11 eliminating alcohol at this time?

12 A. No.

13 Q. Would you know whether the person is
14 absorbing alcohol or eliminating alcohol at this time?

15 A. No.

16 Q. What other information would you need?

17 A. Well, I would need primarily the time that
18 the drinking stops. I would need to know that period
19 of time, or when the last drink was consumed so to
20 speak.

21 Q. What else?

22 A. I need to know the weight of the person.

23 Q. Let's assume that the weight is 120 pounds.
24 What else would you need to know?

25 A. When they ate last.

1 Q. You said you would need to know this
2 information?

3 A. Yes. To give you -- I assume you want an
4 accurate figure.

5 Q. Yes.

6 A. I could guess.

7 Q. I would like you do give me an accurate
8 figure.

9 A. To give you an accurate figure I need that.

10 Q. You have the time the drinking stopped.

11 A. Obviously it would help if I knew what they
12 were drinking.

13 Generally alcohol has a range, but if I know
14 what they were drinking that would nail one more
15 accuracy scenario I would give you.

16 Q. What if all you knew was four drinks?

17 A. I can come up with an average figure. I
18 have to ask a couple of questions about the drinks.

19 Q. Like what?

20 A. What they were.

21 Q. What else?

22 A. How big they were. That is primarily it. I
23 can figure the alcoholic content if I know what they
24 were.

25 Q. I will not give you anymore information.

1 That is not in evidence.

2 But based on this hypothetical Deputy Zagar
3 testified yesterday assuming the results are accurate
4 that at 2:26 this person would be eliminating, already
5 at 2:26, if the drinking stopped somewhere before one
6 o'clock.

7 Do you agree with that?

8 A. No.

9 Q. Well, why not?

10 A. Because we do not know the factors I
11 indicated to you.

12 Q. You do not know these factors?

13 A. No.

14 Q. Would they make a difference?

15 A. Sure.

16 Q. Based on a hypothetical, you know, 120
17 pounds, five foot three, and assuming that the results
18 are accurate, if this person blew a .19 at 2:26, and
19 120 pounds, five foot three, and assuming elimination
20 pursuant to Deputy Zagar's testimony, what would you
21 expect that person's breath alcohol level to be at one
22 o'clock -- about what is it 90 earlier, less than that
23 84 minutes earlier?

24 MR. MEIRE: I would object because there are
25 not enough facts in the hypothetical according to

1 the expert to make a determination accurately as
2 to what the total would be.

3 MR. GOLDBURGH: That is my point exactly.

4 THE COURT: You know, it is his witness,
5 counsel. If he feels he can respond, let him
6 respond.

7 THE WITNESS: At the time figuring that it
8 was a .19 at 2:26, and you want to know what they
9 were -- or what it wasn't at one o'clock?

10 Q (BY MR. GOLDBURGH) You would expect it to be
11 higher?

12 A. It would be approximately about a .24 to
13 .25.

14 Q. So you are saying --

15 A. Nine to ten drinks.

16 Q. If this reading is accurate at 2:26, at one
17 o'clock you would expect that person to be at a .24.
18 That is more than three times the legal limit?

19 A. Yes. Three times.

20 Q. You know the legal limit in Florida?

21 A. .08.

22 Q. Now, assuming the 120 pounds, five foot
23 three, and the .24, would you be able to estimate with
24 a reasonable degree of certainty how many drinks it
25 would take this person, or how many ounces of alcohol

1 it would get to be a .24?

2 A. Yes.

3 Q. How many?

4 A. It would be nine and a half to ten ounces.
5 That is in the system at the time.

6 Q. So, assuming nine and a half to ten mixed
7 drinks with a shot, or nine and a half beers, round
8 about?

9 A. Correct.

10 Q. Now, if the person has at 120 pounds, five
11 foot three, nine and half to ten drinks in her system
12 at this time what kind of physical observations would
13 you expect to see?

14 MR. MEIRE: I would object to that, Your
15 Honor.

16 THE COURT: Overruled.

17 THE WITNESS: I would expect to see some
18 symptoms associated with someone who is basically
19 extremely impaired.

20 Not only bloodshot watery eyes, but someone
21 that cannot stand without assistance. Someone
22 very unsteady on their feet.

23 Someone with bloodshot eyes, and slurred
24 speech. A person basically not able to
25 comprehend, or understand questions and respond

1 as liked.

2 Q (BY MR. GOLDBURGH) Would they be able to
3 interpret and follow instructions based on your
4 experience?

5 A. Probably not.

6 Q. Obviously, people have -- there are people
7 that have a higher tolerance for alcohol?

8 A. There are people that drink every day, and
9 drip excessively, and they can tolerate that more than
10 the average person.

11 The average person would not be able to
12 function at that level.

13 Q. The hypothetical does not assume any
14 drinking history, correct?

15 A. That is correct.

16 Q. You had an opportunity to view the video in
17 this case?

18 A. Yes. I did.

19 Q. In your observations of how Ms. Intorcchia
20 looked on the video --

21 MR. MEIRE: Objection to observations on the
22 video.

23 THE COURT: Sustained.

24 Q (BY MR. GOLDBURGH) You said extremely
25 impaired, right?

1 A. Yes.

2 Q. Now, you testified on your knowledge of how
3 the intoxilyzer works?

4 A. Yes, sir.

5 Q. Okay. And you have done your own
6 experiments?

7 A. Yes, sir.

8 Q. Are you familiar with the stages that the
9 Intoxilyzer goes through when, you know, when the
10 operator presses the start button?

11 A. Sure.

12 Q. Actually, are you familiar with this
13 document, or at least this type of document?

14 A. Yes. I have seen it.

15 Q. What does that represent?

16 A. Well, it represents a print out card of the
17 Intoxilyzer. It is not completed, but it represents a
18 print out card.

19 Q. Let's complete it for you. How about that?
20 It still needs another air blank after this?

21 A. Right.

22 Q. Now the person that is operating the
23 intoxilyzer will press the button, and put this card
24 into the Intoxilyzer?

25 A. Correct.

1 Q. Now, you use the term air blank?

2 A. Yes.

3 Q. What is that for?

4 A. Well. An air blank --

5 Q. What is it for? What does it do? What is
6 it supposed to do?

7 A. The air blank is to ensure that the machine
8 does not have other than ambient air present in the
9 chamber prior to another sample being taken.

10 This is there to ascertain that no residual
11 or other alcohol is left over in the chamber so that
12 it may affect another reading later.

13 Q. It is supposed to assure that there is no
14 alcohol left over from a prior subject, or other
15 contaminants?

16 A. Whatever could be in the area.

17 Q. Then it will ask for the subject to blow?

18 A. Correct.

19 Q. And then it cleans out the sample chamber
20 again?

21 A. Yes.

22 Q. And it asks the subject to blow?

23 A. Yes.

24 Q. And the air blanks do the same thing?

25 A. Yes, sir.

1 Q. As far as you know they are supposed to
2 clean the sample chamber out so it is getting what it
3 believes to be a clean subject from the subject
4 blowing at the time?

5 A. That is correct. Yes, sir.

6 Q. Deputy Zagar testified yesterday that the
7 way that the operator knows that there is no
8 contamination in this machine from a prior subject is
9 because this breath card will take a -- he said the
10 breath card will give triple zeros during the air
11 blank, and he said on the LED display you will see
12 triple zeros.

13 He also testified that there is something
14 called an ambient air failure, and that will tell the
15 operator that there was some contamination left over,
16 is that true?

17 A. No.

18 Q. Why not?

19 A. The ambient failure will only go off on
20 basically the first test of the day, so to speak.

21 If there is ambient air, other than ambient
22 air, if it is not detected on the first time, you can
23 have all kinds of alcohol in the chamber and never
24 pick it up again. What happens is the machine zero
25 references itself with what is in there.

1 In other words if the machine could think,
2 the machine thinks as it goes through the check that
3 there is nothing in the chamber.

4 So the machine is assuming that because it
5 is sucking in air from the room that it has to be
6 zero, zero, zero.

7 If you turn a computer on, it reads certain
8 things every time. When you turn it on if it changes
9 the computer will automatically -- in this case the
10 Intoxilyzer -- references if there is alcohol it will
11 believe it to be clear air, and reference itself on
12 that. I know it is confusing, but--

13 Q. Are you saying that even if there is alcohol
14 left over from a prior subject that it will
15 automatically say zero?

16 A. Yes.

17 Q. How does that happen?

18 A. Because of the software check. The software
19 is supposed to read zero, zero all the time. The
20 subject test -- the analysis of the software.

21 The software is meant to pick up what is
22 blown into the sample chamber. It gives you a reading
23 at that point, but on the air blanks, it will always
24 read zero, zero, zero.

25 That is what it is programmed to do.

1 Q. Regardless if there is alcohol?

2 A. No matter what happens you will get zero,
3 zero, zero.

4 Q. Obviously, you know this. Let me ask you
5 the pointed question.

6 If this is not the breath -- first breath
7 test of the day, and someone else blows before this
8 particular person, is there any way to be sure that
9 the results obtained is an accurate result based on
10 this air blank situation?

11 A. Yes.

12 Q. How?

13 A. You can do a test between each subject test.

14 Q. If you do not do that test between each
15 subject test, would the operator know if there is any
16 contamination left from a prior subject?

17 A. Not likely. No.

18 Q. What is this test you are talking about?

19 A. The test is what is called additional -- we
20 call it a controlled test.

21 When we do experiments, and we hook up a
22 simulator to the machine, and between, and after each
23 subject test we have an air blank, and we have a
24 control test.

25 And what that does -- we put a solution, and

1 we mix it usually for our experiments at a .15. You
2 can do whatever. So we know what is in this
3 controlled sample.

4 I know that in this controlled sample I have
5 a .15, or whatever the number would be. Then I inject
6 that into the Intoxilyzer, and that way if there is a
7 problem I know immediately that something is wrong.

8 Q. You can do that at the time that the subject
9 takes the breath test?

10 A. Yes. It is easy. You hook the simulator,
11 and flip another switch on the side. Set it.

12 Q. Could the operator do that during the time
13 the subject takes a breath test?

14 A. Sure. They could.

15 Q. Why is that important?

16 A. It is important because the operator wants
17 to make sure that when you are conducting the test
18 that there is no contaminants.

19 In the event one does happen, you have a
20 solution that, you know, what it is. Obviously, you
21 do not know what the subject is. You have an
22 estimate, but you do not know.

23 This way by putting something in the machine
24 that you know is correct if there is an error, you see
25 it immediately, and you say I have a problem with, A,

1 B, C, or D, or take actions or steps to correct it.

2 Q. That can be run between each blow, and
3 beforehand?

4 A. You can run it once, three times. Normally
5 they take thirty seconds.

6 Q. Deputy Zagar said that when he does his
7 agency inspection, he does it once a month?

8 A. Okay.

9 Q. He says he gets premixed solutions from
10 another company, and that they come in a bottle with a
11 number on it at different values. A .05, .08, and
12 .20.

13 I asked him how do you know that your
14 intoxilyzer is accurate every month? And he said
15 because we use the solution, and run it through the
16 machine.

17 And I said to him, how do you know that your
18 solutions are accurate? He said, well I ran them
19 through different machines five or six times, and that
20 tells me my solution is accurate.

21 I asked him the question. I said does that
22 make sense for you to test the machine with the
23 solution, and the solution with the machine?

24 Now, his answer was it is forensically
25 sound. Do you agree with that?