

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
INDIAN RIVER COUNTY, FLORIDA

CASE NO. 1983723

STATE OF FLORIDA

Plaintiff,

vs.

RANDALL LEE MOSBY,

Defendant.

INVESTIGATIVE STATEMENT VIA TELEPHONE

The appearances were as follows:

FOR THE STATE:

MAGGIE KEYS
Assistant State Attorney
2000 16th Avenue
Suite 329
Vero Beach, Florida 32960

FOR THE DEFENDANT:

CHARLES A. SULLIVAN, JR.

PROCEEDINGS

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MS. KEYS: - an investigative hearing in reference to Randall Lee Mosby versus, versus the State of Florida in case 1983728. Can I get you to raise your right hand.

MR. SWOPE: Yes, it's raised.

MS. KEYS: Do you solemnly swear or affirm that the testimony that you shall give or the statement that you shall give shall be the truth, the whole truth, and nothing but the truth, so help you god?

MR. SWOPE: I do.

DIRECT EXAMINATION

BY MS. KEYS:

Q Okay. I have a couple questions for you. First of all, what, name specifically what you've reviewed in this case in reference to preparing your testimony.

A Well, I've reviewed the discovery in the case that was, I believe, prepared by your office.

Q Can you state specifically what reports and things that you have reviewed.

A Okay. I've reviewed, let's see, FDLE alcohol testing reports, Form 24s for the month of April 27, 1998, May 31, 1998, June 30, 1998. I reviewed an arrest affidavit of Randall Lee Mosby. I can't read the officer's name on it but the face sheet with one page attached, two-page report.

Q That would be Deputy Ron Houston?

1 A It's - yeah. It looks like his badge is 706,
2 whoever that is.

3 Q Yes.

4 A I can't read his name, but that's what it is.

5 Q Okay.

6 A I also have - that's a handwritten report. I also
7 have a Indian River County Sheriff's Department offense
8 incident report which is typed out and printed which has the
9 year of his vehicle. Also has a - let's see. There's - Oh.
10 It contained an alcohol influence report checklist, breath
11 testing affidavit, evidence card, driver's license, copy of
12 it, copy of citation, copy of arrest affidavit. I think
13 that's, I'm looking, but I think that's about it.

14 Q Okay. Did you receive a copy of the video as well?

15 A No.

16 Q And are you doing retrograde in this case?

17 A I've looked at retrograde, yes.

18 Q Okay. And what factors did you consider in
19 retrograde?

20 A Well, let me get to that. The factors I considered
21 was that he was a 45-year-old male, he was approximately 150
22 pounds, at 11:30 a.m. on that date he had a full lunch, he
23 began drinking sometime between 2:30 and 3:00 o'clock, p.m.,
24 in the afternoon - I used the time 2:45, so I split it right
25 in half. He was arrested approximately 5:23. He had his

1 first breath test approximately seven - I can give you the
2 exact time here - first breath test was 7:02, and that was a
3 point one two one. His second breath test was a point one one
4 six, which was done at 7:04. I also considered the fact that
5 the police found an open container in his car of rum, I
6 believe, and also some coke, and about one-half the bottle,
7 roughly, was gone. It was a pint, according to the report.
8 There's sixteen ounces in a pint. If half a bottle was gone
9 I used the figure of eight ounces. I used extrapolation.
10 Those numbers that I gave you, in other words, the time that
11 he started drinking, obviously, he didn't drink from the time
12 the police stopped him, I don't think, so I considered that as
13 well, so he began drinking somewhere around 2:45, his first
14 breath test was approximately seven o'clock, he was stopped
15 with alcohol in the car, and I used the Widmark formula, just
16 coming up with a rough estimate of what his level could have
17 been, whether he was going up or down.

18 Q Okay. And what was your conclusion on that?

19 A My conclusion was was that he could be in a range
20 from a point, using a breath range he could be in a breath
21 range from a point zero five to a point one seven, and
22 obviously that depends on if he is going up or down. In this
23 case, since they found an open container in the car, he had
24 coke in the car, to apparently mix the drink, or whatever, and
25 I believe he made some kind of statement that he consumed

1 about half the bottle, and he also told the police he started
2 drinking about 2:45, so I used those factors in the
3 consideration, so I believe he was on the way up. Although I
4 did give you a range, if he was going up or down.

5 Q And so what is your conclusion, as far as if he was
6 going up, what his BAC was, or BAL was at the time, at the
7 time of the stop?

8 A Well, at the time of the stop, if he was on the way
9 up, he would be, he could be an oh five to an oh six. Now,
10 probably - I came up, actually, like, with an oh five nine, so
11 it's so close to an oh six, I mean, you can, you know, one
12 one-thousandth will give you an oh six, so it's, actually oh
13 five nine, so you can use oh five nine or oh six, it doesn't
14 really matter, it's so close. And that will be if he's going
15 up. If he's doing down, it will be approximately a point one
16 seven at the time he was stopped, and if he's going down then
17 he would be approximately a point one two at the time of the
18 breath.

19 Q Okay. Did you take into consideration that he told
20 the police officers that he drank three fourths of a pint of
21 rum?

22 A I looked at that also. But I think there was only
23 one-half of a bottle was gone.

24 Q Correct.

25 A So, that's, that's what I used. I mean, I think he

1 said, you know, approximately, he said approximately, I think,
2 he had three-quarters of the bottle, but half the bottle was
3 there, so, you know, I mean, that's a better fact to me that
4 what he actually said, if there's half in the bottle, and he
5 didn't indicate any other bottles that he had, so, I'm just
6 using that.

7 Q So you didn't speak to the defendant?

8 A No, I did not.

9 Q Now, because you did not review the tape so
10 therefore you're not going to be testifying as far as the
11 field sobriety exercises?

12 A I don't think so. Mr. Sullivan has not asked me
13 that at this time. I generally look at the tapes usually
14 right before trial. Mr. Sullivan will provide it or not. If
15 he, if he has me to look at it, I'll certainly look at it and
16 I'm sure I would tell you what, any comments I may make before
17 I go on the stand. I'm sure. At this point I have not looked
18 at it.

19 Q Now, did you take into consideration any type of
20 mouthwash, or anything to that effect?

21 A Any type of mouthwash?

22 Q Yes.

23 A No.

24 Q Okay. And what is your understanding of the length
25 of time that any alcohol substance will stay on someone's, the

1 mouth alcohol? What is your, what is your opinion as far as
2 that's concerned?

3 A Well, that's a pretty broad question, because
4 normally, mouth alcohol dissipates rapidly. In most cases it's
5 gone in fifteen minutes. There are other situations, in other
6 words, if it's an hour before the time, you know, where the
7 police watch him for an hour, and I've seen cases where there
8 is mouth alcohol. Well, obviously, that means someone has
9 regurgitated or burped or something, maybe had something in
10 their mouth, whether it be dental or some other type of object
11 that will, you know, hold alcohol.

12 Q Now, is there anything like that that you're aware
13 of in this case?

14 A I'm not aware of anything in this case, no. At this
15 point, no.

16 Q In, in your estimation and when you're calculating,
17 Mr. Swope, what is, how much would this defendant have had to
18 drink if, to make his breath alcohol levels of one one six, or
19 a one two one?

20 A Well, at the, if the one two one is correct, at the
21 time of the test, in other words, I'm assuming, I'll use the
22 highest figure, which is a one two, he would have
23 approximately five to five and a half ounces of alcohol in his
24 system at the time.

25 Q And what burn-off ration are you using?

1 A Point zero one five.

2 Q Per hour?

3 A Yes, ma'am.

4 Q Now, what type of, what type of margins of error are
5 you using, or do you use with the instruments?

6 A Well, there are two errors for the instruments, or
7 the machine itself. That would be the point zero zero five,
8 which is the manufacturer's agreed to error, or unreliability,
9 so to speak. And I also use the point zero two zero, which is
10 the State compliance. In other words, two breaths must be
11 within a compliance of zero two zero. However, I don't,
12 that's not my terminology with the oh two oh. The oh two oh
13 is, in my opinion, based on the difference between a blood and
14 breath reading, or an alcohol reading, that the closest the
15 breath could come which would be an oh two oh.

16 Q But without doing, without the converting the breath
17 to blood, strictly going on breath alone --

18 A Well, you can't do that.

19 Q Well, but in the state of Florida it's point oh, it,
20 it's for, you know, the grams of breath. You know, it's --

21 A No --

22 Q -- strictly --

23 A -- no, I don't, again, I'm not here to interpret the
24 law. I'm here to tell you that there is no such thing. You
25 do not have, you cannot have a breath test without having a

1 blood level assigned to it. You can't do it. I mean, the
2 State of Florida, for some, some idiot came up with some
3 reason to say that all of a sudden the machine's read blood
4 alcohol for years. The first ten years the machines were in
5 the state they read blood alcohol. All of a sudden, they came
6 up with a magic chip to say that now it's going to read breath
7 in grams. That's bull crap. There ain't no such thing.

8 Q When you're talking about the point oh two oh
9 compliance, in this case, the breath samples were point one
10 one six, and a point one two one; correct?

11 A Correct.

12 Q And therefore the difference between the two is oh
13 oh five?

14 A Yes. It certainly, it's certainly within compliance
15 by FDLE rules, absolutely.

16 Q Now, did you, you actually reviewed the documents
17 for this specific instrument; correct?

18 A I did. The ones I indicated to you, yes, ma'am.

19 Q And in reviewing those documents, did you see
20 anything that would, anything that was not in compliance with
21 FDLE?

22 A Did I see anything not in compliance --

23 Q Yes.

24 A -- on the forms? No. Not according to the forms,
25 no.

1 Q What about the maintenance logs and maintenance
2 records.

3 A I didn't see anything written on the maintenance
4 logs that would indicate they are not in compliance, no.

5 Q And did you examine the specific instrument in this
6 case?

7 A You mean, personally?

8 Q Yes.

9 A No. But I certainly would if you let me.

10 Q And, sir, so you have no reason to believe that
11 there's anything wrong with this instrument or the breath
12 reading at the time it was taken?

13 A Well, I didn't say that. I said that the documents
14 are in order. I didn't say anything was wrong with the
15 machine.

16 Q Okay. Well, do you have any reason to believe that
17 there is anything wrong with the instrument?

18 A Sure.

19 Q Why?

20 A Because you can't, I don't mean you, but I mean, the
21 officer can't tell me that it's in compliance or not, other
22 than the written documentation on the form.

23 Q Well, what, what are you basing your opinion on as
24 far as why it is not reading accurately?

25 A Well, because the, just to give you one example, is

1 that the simulator solution that you use in your monthly test,
2 and by you, I mean the officer, is only to the second digit.
3 In other words, the solution is, in other words, when you do
4 an oh eight test, the officer does, the solution is oh eight.
5 Yet the machine reads out to the third digit. And we know
6 that the State says that the machine must be in compliance of
7 an oh oh five. If we don't know the third digit on the
8 solution, we therefore don't know if the machine is off at
9 all. In other words if the machine is off, say, point zero
10 zero two, and let's say the solution is a point zero zero four
11 off, or point zero zero eight off, the machine could actually
12 bring the solution down, or up, depending on what it is, and
13 could actually keep the machine within compliance of a point
14 zero zero five, but we would never know. The problem is that
15 you're testing two unknown solut- you're testing an unknown
16 solution on a machine that you're trying to find out what the
17 unknown reading is. So, therefore, no one can tell me that
18 that machine is within an oh oh five. It's a ridiculous way
19 of doing things.

20 Q Well, and how do you, how do you factor that into
21 your, your, your calculation of the breath readings?

22 A Well, I don't factor that in at all. I'm just, I'm
23 answering your question, to say, do you know if this machine
24 is in compliance. And the answer is no, I don't know, and
25 neither does anyone else. I know what the form says. But the

1 form doesn't, the form is written that it tells me that it's
2 in compliance, but that doesn't mean it is, because the State
3 only tests to the hundredths when the machine reads to the
4 thousandths. And we already know it's off because if you look
5 at any one of the maintenances, well, at least most of the
6 readings are off either hundredths or two-hundredths - I'm
7 sorry - thousandths, so there is no, you know, very few exact
8 readings.

9 Q Is it unusual to have non-exact readings in stock
10 solution cases --

11 A Well --

12 Q - you know, for your --

13 A - for the State, no, it's, it's not unusual. When
14 I do scientific experiments, it's unusual for me to do it
15 because mine always come out to the third digit, because I
16 know what my solution is.

17 Q Do they all come out exact to the third digit?

18 A Exact, if the machine is right, and if the solution
19 is right.

20 Q And what type of machines do you own?

21 A Well, I, I don't own any machines. I maintain them
22 for private businesses, and they're Intoxalyzer Series 64, 66
23 and 68.

24 Q The same series of instruments that are used by --

25 A Right.

1 Q - Indian River County?

2 A Correct.

3 Q One moment, please. What is your understanding of
4 the, of the goose solutions that are taking place in the State
5 of Florida?

6 A What's my understanding - I missed your part --

7 Q Of the goose, the goose solutions, that there are
8 rumors going around about some sort of goose solutions that
9 were sent out by the State of Florida, and the labs as far as
10 testing the instruments.

11 A Uh huh.

12 Q What is your understanding of that? Or what is your
13 opinion of that?

14 A Well, you know, I really don't have any real basis
15 of fact for that as to whether the solutions are accurate or
16 not, as far as the goose solutions go. All I know is that the
17 State requirements are is that whoever uses, in other words,
18 your department or any others, or FDLE, that uses an outside
19 supplier of solution, there's supposed to be a certificate of
20 authenticity as to the solutions. I have never seen one,
21 although I've been asking to see one for the past two years
22 from any agency I've testified against, or for, and I have
23 never seen one yet. The only thing I've seen is the Lot
24 number from Florida Department of law Enforcement. But I have
25 seen no batch replies or any batch administrative paperwork to

1 show that the solutions have been tested or not.

2 Q Okay.

3 A By he way, on your documents, the officer did not
4 indicate where his solutions come from, which normally they
5 do. I'm not saying it's right or wrong. I'm just saying it's
6 not on the forms. I don't know if he's using goose solutions
7 or a solution prepared by Florida Department of Law
8 Enforcement.

9 Q Okay. Can you walk me through the steps of
10 calculating this defendant's blows of the one two one - I
11 guess we can take that -- and then just subtract whatever you
12 would subtract from the one six one, as well, as to, walk me
13 through it, each individual step as to how you're going to
14 testify in this case, according to the reading. Do you
15 understand what I'm saying?

16 A No.

17 Q An sort of margin of error type of thing.

18 A I already basically told you that. I mean, there's
19 the margin of error is an oh oh five on the machine, or
20 solution, either one. And also you have the oh two oh
21 compliance. So basically, if you just add those two together,
22 you have a point zero two five, and you can plus or minus that
23 off the reading. That's really all I'm going to do. I mean,
24 whether I'm going to testify to that in court or not, I don't
25 know. That's just what I did here.

1 Q I see.

2 A And then the traditional formula that you can figure
3 out is, obviously, for the Widmark formula, is the WRCT
4 divided by zero point eight, which is the gravity of alcohol.
5 And you already have the information to figure that out. Or
6 your officer can, one or the other.

7 Q I'm sorry. I didn't follow you there. The WRCT,
8 what is that?

9 A Well, that's the, that's just basically the Widmark
10 formula.

11 Q Uh huh.

12 A Which is, you know, just figuring out the amount of
13 alcohol in one's system, based on the reading.

14 Q Now, on the oh two compliance, the difference in the
15 two breath samples here is a point oh oh five, so basically,
16 the difference between that is a point oh oh two five;
17 correct?

18 A Right. There's, there's no question that the two
19 readings are certainly within State compliance. I'm not
20 arguing that point.

21 Q Okay. And, so, in reality the difference between,
22 with the point oh two oh is actually point oh oh two five;
23 correct?

24 A What do you mean? Oh -- no --

25 Q Well, you just --

1 A -- there's an extra oh in there.

2 Q -- you're talking about the compliance is point oh
3 two oh. I'm not talking about the built in differential in
4 the instrument of point oh oh five.

5 A Okay.

6 Q I'm talking about the oh two oh compliance.

7 A Right. Oh two oh compliance.

8 Q Right.

9 A Right. What --

10 Q Well, in this case, the actual compliance between
11 the two breath samples is a point oh oh two five; isn't that
12 true?

13 A Well, that's true, yes. That's not exactly what I
14 mean, though.

15 Q Okay. But in this particular case, that is the
16 difference between the two breaths --

17 A Right.

18 Q -- when you're talking about the oh two agreement, or
19 the oh two compliance.

20 A Right. Correct.

21 Q So, in this case, if you're taking the, you subtract
22 the point oh oh five, which would bring you a one one six,
23 you're taking the one two one breath, subtract your oh oh
24 five, you got a one one six, and then you subtract the
25 compliance between the two on that of oh oh two five, that

1 brings your breath, your breath reading down to a point one
2 one three five; correct?

3 A If you do it that way, correct.

4 Q Okay. All right. I don't have any other questions.

5 A Thank you, ma'am.

6 MS. KEYS: Do you have any other questions, Mr. Sullivan?

7 MR. SULLIVAN: This is a State - it's not a deposition.
8 It's your, we're simply allowing you to do the, what you
9 intended to do with your investigative subpoena.

10 MS. KEYS: All right. I have no further questions. Thank
11 you.

12 MR. SWOPE: Thank you, ma'am.

13 (Statement concluded.)

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C E R T I F I C A T E

I, Patricia Bargo Held, certify that I transcribed the recorded Statement of Mr. Swope in Case No. 1983723, State of Florida v. Randall Lee Mosby, and that the preceding pages, numbered 1 through 17, inclusive, constitute a true and accurate transcription of the proceedings from the recording, to the best of my ability.

DONE AND SIGNED this 22nd day of December, 1998.

Patricia Bargo Held
Patricia Bargo Held