

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

STATE OF FLORIDA,

vs.

CASE NO.: 97-002173MM10A
JUDGE GINGER LERNER-WREN

RANDON SCOTT POLLOCK,

Defendant.

_____ /

Fort Lauderdale, Florida
June 18, 1997
1:30 p.m.

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 18th day of June,
1997 at 1:30 p.m.

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MOTION TO SUPPRESS
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APPEARANCES:

OFFICE OF THE STATE ATTORNEY
By: **STACY OLETSKY**, Assistant State Attorney,
appearing on behalf of the State.

MATHEW I. DESTRY, 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>
Richard Swope by: Mr. Destry	3,	23		
Voir Dire by: Ms. Oletsky		9		

EXHIBITS FOR IDENTIFICATION: Page 23.

* * * * *

1
2 Whereupon,

3 The following proceedings were had:

4 MR. DESTRY: Defense calls Richard
5 Swope.

6 THE CLERK: This is entered as Defense
7 One, Judge?

8 THE COURT: Yes, ma'am.

9 Thereupon,

10 RICK SWOPE

11 was called as a witness and having been first duly
12 sworn by the Court, stated as follows:

13 MR. SWOPE: Yes.

14 DIRECT EXAMINATION

15 Q (BY MR. DESTRY) Mr. Swope, please tell the
16 Court how it is you are employed?

17 A. Swope Reconstruction.

18 Q. And what does Swope Reconstruction do?

19 A. We do primarily accident reconstruction.

20 And about ten or fifteen percent of the business
21 deals with DUI consultations involving either the
22 Breathalyzer routines, or else the field sobriety
23 issues that are brought up.

24 Q. All right sir.

25 In connection with this work did you

1 have occasion to work with the Intoxilyzer Five
2 Thousand?

3 A. Yes.

4 Q. How long, sir, have you been working with
5 the Intoxilyzer Five Thousand?

6 A. Well, I have been working with that
7 particular machine since 1985. There are three
8 models of the machine I work on, or have worked with
9 all three models.

10 Q. Are you familiar with, in particular,
11 intoxilyzer number 64-002864 owned by the Broward
12 Sheriffs Office?

13 A. Yes.

14 Q. And could you tell the Court, please, how
15 it is you are familiar with that machine?

16 A. I put that machine in service when it first
17 came on line.

18 Q. In 1988?

19 A. Actually, I thought it was 1987 when it
20 came on line. We got the machine I think in 1987,
21 but for some reason we did not put it on line until
22 later.

23 Q. Until later when it was certified by HRS?

24 A. Yes. We had problems with the initial set
25 of machines. We had to keep sending them back until

1 the company came out, and found what the problem was.

2 The problem was they were built in
3 Colorado, and they found a problem with the Florida
4 humidity.

5 Q. How long did you work for the Broward
6 Sheriffs Office?

7 A. Six years.

8 Q. And can you tell the Court, have you ever
9 been qualified as an expert in the field of breath
10 testing?

11 A. Yes.

12 Q. How many times?

13 A. I do not have a breakdown between breath
14 testing and field sobriety, but I have testified as
15 an expert over six hundred times.

16 Q. Have you testified for the State as well as
17 defense?

18 A. Yes.

19 Q. Mr. Swope, give us an idea briefly of your
20 educational background?

21 THE COURT: Counsel, for the record we
22 went through this yesterday. If you can
23 focus on -- we went through this in another
24 unrelated case -- but if you could focus on
25 the intoxilyzer experience limiting it to

1 that. That would be fine.

2 MR. DESTRY: Judge, I could save us
3 time if you, would like for record purposes
4 to establish his credentials.

5 THE COURT: Does the state have any
6 objection?

7 MS. OLETSKY: I would like to have his
8 credentials established for the record.

9 THE COURT: I am asking then that it be
10 limited to the area, narrow it to the issue
11 we are here on, that is to the intoxilyzer.

12 MR. DESTRY: I have to establish his
13 credential as to engineering and such.

14 Q (BY MR. DESTRY) Briefly, sir, can you
15 outline for the Court your background as it relates
16 to the intoxilyzer, and your expertise therein?

17 A. I have been a breath testing operator since
18 1974. I became an instructor in 1995.

19 I have been certified or qualified on
20 seven different types of machines. I have been
21 involved with intoxilyzers since 1985.

22 I was on one of the testing committees
23 for HRS to view the standard of the intoxilyzer model
24 when it first came out.

25 In other words, we did several months

1 of testing and correlations between blood and breath
2 that were turned in to HRS.

3 The machine was adapted and put into
4 service I believe in probably 1986, sometime within
5 that period.

6 I worked with it either as a
7 maintenance operator, or gave breath tests, repairs
8 et cetera for the next several years.

9 I have been to the CMI repair course.
10 I have been to approximately five hundred hours of
11 additional courses dealing with the operation and
12 certification of the machines, how it works, how to
13 take it apart, those types of things.

14 I have a Bachelors Degree in criminal
15 justice. I have a Masters in engineering from the
16 University of Miami.

17 I have tested the machine
18 independently since 1989. I have ran experiments on
19 all three models all the time.

20 I maintain -- up until last year I
21 maintained all training machines at the Broward
22 police academy. I maintained two machines for the
23 five thousand series for private individuals.

24 I have also worked on maintaining
25 machines for private industry in the Five Thousand

1 series so I am very familiar with them.

2 MR. DESTRY: I would tender Mr. Swope
3 as an expert in the field of breath testing.
4 In particular with regards to the
5 Intoxilyzer Five Thousand mode.

6 THE COURT: State, do you have any
7 objection? Do you want to voir dire?

8 MS. OLETSKY: The State does not want
9 to do any voir dire. The State would
10 object.

11 There has been nothing to establish
12 that he is actually an expert in the
13 Breathalyzer other than he has operated it,
14 and that is no different than anybody from
15 BSO who does maintenance or operates the
16 Breathalyzer for breath tests.

17 THE COURT: Why don't you voir dire
18 this witness?

19 MS. OLETSKY: Judge, he has gone
20 through his entire history and background,
21 and nothing from that indicates that he is
22 in fact an expert.

23 THE COURT: In what?

24 MS. OLETSKY: In the actual
25 intoxilyzer. He does maintenance on it, he

1 operates it the same as anybody who would
2 come here to testify that they run the
3 maintenance and administer the Breathalyzer.

4 THE COURT: Why don't you voir dire the
5 witness, and lay a factual basis?

6 I understand your objection, and I am
7 listening to your objection--

8 MS. OLETSKY: I can ask some questions.

9 THE COURT: -- but I am having trouble
10 in terms of developing a ruling on your
11 objection because I have only got what the
12 defense has elicited through his testimony.

13 MS. OLETSKY: I can ask him questions.

14 VOIR DIRE

15 Q (BY MS. OLETSKY) Mr. Swope, isn't it true
16 that the Florida Department of Law Enforcement
17 actually certifies these breath testing instruments.

18 A. Now they do. Yes.

19 Q. And in 1996 they did?

20 A. Yes, ma'am. They did.

21 Q. And you are not employed by the Florida
22 Department of Law Enforcement presently, are you?

23 A. No.

24 Q. Were you ever?

25 A. No.

1 Q. And the Florida Department of Law
2 Enforcement has never given you the power to certify
3 any of these machines, is that correct?

4 A. I don't know if there is such a thing as to
5 power to certify. I do not understand the question.

6 Q. They have never certified that you are
7 capable of going out to certify as an independent
8 contractor these machines?

9 A. As an independent contractor?

10 Q. Let me ask it another way.

11 You cannot go out and actually certify
12 a machine for FDLE, is that correct?

13 A. I do not know what their qualifications
14 are. I have a permit, but I don't know --

15 THE COURT: A permit for what, sir?

16 THE WITNESS: A permit to perform -- to
17 operate the machine, and perform
18 maintenance.

19 THE COURT: To operate and perform
20 maintenance. Can I ask a question? Any
21 objection?

22 MR. DESTRY: No objection.

23 THE COURT: Who does do the
24 certification--

25 MS. OLETSKY: FDLE.

1 THE COURT: -- on behalf of FDLE?
2 Who are these individuals, do you know?

3 MS. OLETSKY: Warren Sanger is one.

4 THE WITNESS: Not true.

5 THE COURT: Let me direct it to the
6 witness.

7 THE WITNESS: There are no inspectors
8 that certify the machines. The machines are
9 certified by either the manufacturer, or
10 they are certified by the George Thomas
11 Agency in Jupiter.

12 Those are the only people who can
13 certify it as operational monthly
14 maintenance or annual.

15 THE COURT: Thomas Agency. What is
16 that.

17 THE WITNESS: The official repair
18 facility from CMI.

19 THE COURT: Who is CMI?

20 THE WITNESS: The builder and designer
21 of the intoxilyzer series.

22 THE COURT: And CMI stands for what?

23 THE WITNESS: I do not know what it
24 stands for anymore.

25 THE COURT: They go by the acronym of

1 CMI?

2 THE WITNESS: Yes.

3 THE COURT: Are you an electrical
4 engineer.

5 THE WITNESS: I have an electrical
6 background, but my engineering degree is in
7 industrial and mechanical.

8 THE COURT: You are not an electrical
9 engineer?

10 THE WITNESS: No.

11 Q (BY MS. OLETSKY) Are you employed by the
12 George Thomas Company.

13 A. No.

14 Q. Are you employed by CMI?

15 A. No.

16 Q. And these are the people who would actually
17 certify or not whether the machine is in compliance
18 with FDLE, is that correct?

19 A. No.

20 Q. No?

21 A. No.

22 Q. Who actually does that?

23 A. FDLE inspectors would certify it based on
24 whatever the rules are, and operators that have
25 permits to operate the machine and perform

1 maintenance would certify it on the monthly basis.
2 The state does it annually.

3 THE COURT: Let me stop. Let me see if
4 I understand the basis of the motion for the
5 purposes of this witness.

6 Is the issue then one of the
7 reliability of the intoxilyzer?

8 MR. DESTRY: Yes. Judge, I do not know
9 if you have my motion it lists case law. I
10 do not know if you -- I sent courtesy
11 copies.

12 THE COURT: If you did, I am sure it
13 was a little bit ago. Those are the cases
14 that I'm looking at.

15 MR. DESTRY: Those cases are on point.

16 MS. OLETSKY: The State provided, Your
17 Honor, with case law on point. That would
18 be the Rayfield versus State case.

19 THE COURT: I guess the issue that I
20 have, sir, relates to the fact that pursuant
21 to the invoice that you have admitted into
22 evidence thus far, indicating that this
23 machine had been taken out of service to be
24 cleaned, adjusted, repaired, and
25 recalibrate, correct?

1 MR. DESTRY: That is correct. That is
2 what the invoice said.

3 THE COURT: That is what the invoice
4 said.

5 Then it would seem to me that if you
6 are going to bring on any expert to testify
7 in this case, it would be someone who would
8 have to have personal knowledge of the inner
9 workings -- internal workings from an
10 engineering, from a technical background of
11 the Breathalyzer, not from the procedural
12 end of the Breathalyzer in terms of the
13 administration of the exams.

14 And even as I understand, and -- no
15 disrespect with regards to the fact that you
16 participated on standards -- but I think we
17 are looking at a narrow issue as to the
18 functioning from I guess from an -- this is
19 an instrument, and I guess from an
20 engineering standpoint.

21 And I do not believe this individual
22 thus far has demonstrated that kind of
23 background.

24 MR. DESTRY: Do you want me to ask a
25 few more questions? If I can, Your Honor?

1 THE COURT: Do you see what the Court
2 is focusing on?

3 MR. DESTRY: Yes, ma'am. I see where
4 the court is focusing.

5 REDIRECT EXAMINATION

6 Q (BY MR. DESTRY) Mr. Swope, you have taken
7 this particular instrument apart on a number of
8 occasions?

9 A. Yes. The series I have, not this
10 particular one.

11 I mean I may have taken this
12 particular one apart originally, but obviously not in
13 the last several years.

14 Q. When we say this particular one we mean
15 64-00284?

16 A. I own one.

17 Q. But you own one that is identical to that?

18 A. Identical. It is a sixty-four series.
19 Yes.

20 Q. And you have taken apart the sixty-four
21 series on a number of occasions?

22 A. Yes.

23 Q. Are you familiar with how the machine
24 functions --

25 A. Yes.

1 Q. -- from an engineering standpoint?

2 A. Yes.

3 Q. Do you understand how all the parts go
4 together?

5 I know I am over simplifying, but you
6 know how this machine works, and what make it work?

7 A. Pretty much.

8 I mean there are a few things in the
9 software package, that I may not be aware of because I
10 do not do electrical work, but I am aware of the
11 mechanical operation, and how the machines works.

12 I can fix most things that are broken.
13 Most things. I have taken it apart, and analyzed it.

14 I went to CMI Repair School for three
15 days at the factory. I learned how to take it apart,
16 how to notice things that may be wrong with it. I
17 spent quite a bit of time with it.

18 Q. As you previously testified, your
19 qualifications include a lot more than somebody that
20 just administers breath tests or does monthly
21 maintenance on it, right? That is a forty-two or
22 forty-seven hour course?

23 A. Yes. I have over five hundred hours. All
24 any operator I know of have is no more than forty
25 hours, at best.

1 Q. You testified previously on several
2 committees when this machine was adopted, and are
3 familiar with how it functions, and why it was
4 adopted as an approved test?

5 A. That is correct.

6 MR. DESTRY: Your Honor, does that
7 clear up the area?

8 THE COURT: A little bit.

9 When you say five hundred hours of
10 repair, what does that mean? I don't
11 understand.

12 THE WITNESS: Well. At the time, Your
13 Honor, the factory CMI I indicated was in
14 now -- is now in Owensboro, Kentucky. I
15 went to the repair facility in
16 Midville--Midturn -- I get mixed up -- that
17 is where it was at Colorado.

18 I spent a week there in learning how to
19 take apart the machine, what the operations
20 were, how to repair certain problems that
21 may occur in the machine.

22 After that I took another forty hour
23 course in the state of Florida which dealt
24 with repairing the machine.

25 At one time when HRS had approved the

1 machines they allowed certain repairs. A
2 few years ago they came out where they would
3 not allow operators anymore to get inside of
4 the machine, that kind of went by the
5 wayside. The new rules in 1997 cover
6 repairs again.

7 Then I spent approximately three weeks
8 at courses put on by Dr. Dick Jensen in
9 Minnesota where he has several machines, and
10 we bring our own machines, and we take them
11 apart and we subject them to conditions such
12 as radio frequency interference. We pull
13 out diagnostics.

14 We go through the software package and
15 attempt to find out when we unplug certain
16 things what may work, what may not work, and
17 we work analytic tests on the machine.

18 And then of course when my machine
19 breaks down, and if it is something I cannot
20 fix, it goes into the factory or the George
21 Thomas Agency for repairs.

22 And I go over that with him as to what
23 needed to be repaired, what I broke. Those
24 types of things.

25 THE COURT: You do not repair it

1 yourself?

2 THE WITNESS: Well, most things I can
3 repair. I cannot repair the infra red light
4 spectography.

5 THE COURT: Now, you have testified --
6 I guess because you have some, because of
7 the different areas that you have worked --
8 have you ever testified on issues regarding
9 motion to suppress on certification issues
10 in other courtroom?

11 THE WITNESS: Yes.

12 THE COURT: How many other Courts.

13 THE WITNESS: I do not recall.

14 Most of them actually have been in Dade
15 County. Judge Rodriguez.

16 I believe Judge Parker in Palm Beach
17 County maybe four or five months ago where
18 Ken Ronan was the defense attorney.

19 I do not recall how many. Actually
20 most of them were for modification issues,
21 or repair issues where the machine had gone
22 down for a period of time.

23 THE COURT: Where the machine had gone
24 down for a period of time.

25 THE WITNESS: Right.

1 THE COURT: What was the issue before
2 the Court?

3 THE WITNESS: Well, the issue before
4 the Court was that on some of the cases the
5 machine had been taken out of service, but
6 it had not been taken out due to failure of
7 passing of the maintenance.

8 The machine was taken out because the
9 operator had to keep hitting the reset
10 button, or something electrical was wrong.

11 They would send the machine out and
12 rather than just come back with just the
13 power surge repaired, the machine would come
14 back with about a thousand dollars worth of
15 repairs.

16 A lot of substantial things had to be
17 repaired inside of the machine, and the
18 machine was passing the monthly maintenance.

19 Then there were questions of
20 modification as to what kind of parts they
21 put in. In about the past year they started
22 putting in different parts involving the
23 power supply source.

24 I think that is probably the question
25 in the case is the power supply source at

1 least, as I am aware.

2 THE COURT: State, did you want to --

3 MS. OLETSKY: Judge, I do not have any
4 further question. My objection would remain
5 the same.

6 This motion as I read it goes clearly
7 to FDLE did not recertify the machine after
8 it was recalibrated, and there were parts
9 that were cleaned, and some were repaired.

10 THE COURT: Well, I think you are
11 missing an issue. And that is that
12 according to my understanding of this issue,
13 there is two different potential outcomes.

14 One is that a modification could have
15 required recertification. Or one is that a
16 modification did not require
17 recertification.

18 And whether or not the scientific
19 reliability became at issue, and I am not
20 clear on exactly where one does require
21 certification, and when one does not require
22 certification, but I guess it would have to
23 do, if I had to speculate, with the degree
24 of modification, and the nature of the
25 modification.

1 MS. OLETSKY: Judge, that is how I see
2 this motion the same as you read it. And
3 again, that is up to the Florida Department
4 of Law Enforcement.

5 They determine whether or not a machine
6 needs to be recertified, which is why I do
7 not think that Mr. Swope is qualified as an
8 expert on this narrow issue to testify.

9 THE COURT: I guess the issue though
10 becomes one of whether or not you have a
11 modification.

12 And that would seem to turn on a
13 factual issue. And it would be my guess
14 that the defense is proffering that there
15 was a modification.

16 Is that what you are saying?

17 MR. DESTRY: Yes, ma'am.

18 THE COURT: All right. Well, I am
19 going to go ahead and allow the testimony
20 for those purposes.

21 So I guess for those purposes over
22 State's objection I will allow it.

23 MR. DESTRY: You will recognize Mr.
24 Swope then as an expert?

25 THE COURT: The Court is not

1 recognizing anything.

2 The Court is just acknowledging over
3 State's objection, and will allow him to
4 testify.

5 MR. DESTRY: May I? I think you have
6 my exhibit.

7 THE COURT: Oh, I am sorry.

8 MR. DESTRY: I just need -- the witness
9 needs to look at it.

10 Q (BY MR. DESTRY) Mr. Swope, let me show you
11 now what has been received in evidence as State's
12 Exhibit--or rather Defense Exhibit One, and I ask you
13 do you recognize this?

14 A. Yes.

15 Q. And what is it, sir?

16 A. It is a repair order for machine 2864 from
17 the Broward Sheriffs Office.

18 Q. Okay. And have you seen that type of
19 repair order before?

20 A. Yes. Many times.

21 Q. Have you seen that particular repair order
22 before?

23 A. Yes.

24 Q. Did I submit that to you for your review?

25 A. Yes. You did. But I had this order

1 before. I saw this -- I don't know several months
2 ago.

3 Q. Could you tell the Court, how did it first
4 come to your attention?

5 A. Well, it first came to my attention on a
6 previous case. I do not recall the actual--

7 MS. OLETSKY: I am going to object to
8 any reference to another case.

9 THE COURT: Sustained.

10 Q (BY MR. DESTRY) Let's talk about this
11 particular repair order.

12 It is sort of written in a shorthand
13 that is probably familiar to you as an engineer.
14 Perhaps you can decipher it for us.

15 Can you tell us what was repaired or
16 replaced on this machine?

17 A. Well, in a nutshell really there was just
18 the external breath hose was repaired.

19 The machine -- the first line of the
20 repair bill is something that is always on. They
21 clean it, and adjust it. They calibrated it.

22 Those are things that usually cannot
23 be done back at the sheriff's office or where ever.

24 Several things were replaced. The
25 breath hose, a nut plate, which basically is near the

1 breath hose.

2 CPU battery. That is really the
3 battery that keeps the clock working. It is an
4 internal battery. In other words, once the power is
5 cut off to the machine, the battery keeps the clock
6 going.

7 It is kind of like a car. If you shut
8 your car off and come back an hour later the clock is
9 on at the same time. This is the same type of thing.

10 And then there were some seals, which
11 basically are standard. They repair that usually
12 every time they open it up. They put new seals
13 inside of the machine.

14 The motor. The motor is I guess kind
15 of like a fish aquarium pump. It is like a pump in
16 there, and the motor keeps the fan running, and
17 stuff.

18 There is the power supply, which is --
19 which powers the machine and controls the direct
20 voltage, and items like that.

21 And then there are three things under
22 it, which is what I first notified you about, which
23 is the power supply, plate bracket, and harness. And
24 I had only seen those on one other occasion.

25 Q. Also on that repair bill there is an

1 indication of an IC.

2 What is an IC?

3 A. That has to do either with -- actually some
4 of these are just real short.

5 In other words, it could mean an
6 internal component was changed. Could be internal --
7 something to do with infra red. There are internal
8 components which could be software, or some type of
9 power supply.

10 Q. Or integrated circuit?

11 A. It could be.

12 MS. OLETSKY: Objection to leading.

13 THE COURT: Sustained.

14 Q (BY MR. DESTRY) Could it be something else?

15 A. It could be. But it is most likely some
16 internal supply that they did. Because it is a
17 little cheap to be a circuit.

18 Q. What do they refer to as TOTS?

19 A. One hundred twenty-nine dollars
20 seventy-nine cents.

21 Q. No. As TOTS. T-O-T-S.

22 A. Oh, I thought you said costs. Those are
23 basically just seals, power supplies.

24 Q. Now, you drew our attention just a moment
25 ago to something labeled PS bracket.