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

ORIGINAL

STATE OF FLORIDA,

vs

No. 99-30324MM10
Judge Joel T. Lazarus

DAVID OWEN REICHENBAUM,

Defendant.

Fort Lauderdale, Florida
August 31, 2000
8:30 a.m.

The above-entitled cause came on for hearing
before the Honorable JOEL T. LAZARUS, Presiding Judge,
at the Broward County Courthouse, 201 Southeast Sixth
Street, Fort Lauderdale, Florida, on the 31st day of
August, 2000, at 8:30 a.m.

APPEARANCES:

MICHAEL J. SATZ, State Attorney
By: JOHN HAGER, ESQ.,
Assistant State Attorney,
appearing on behalf of the State of Florida

By: CARLOS CANET, ESQ.,
appearing on behalf of the defendant

MOTION TO EXCLUDE BREATH

1 Thereupon, the following proceedings were had:

2 THE COURT: David Reichenbaum.

3 MR. CANET: Good morning, Judge.

4 THE COURT: Carlos.

5 MR. CANET: How are you, Your Honor?

6 THE COURT: How are you?

7 MR. CANET: I'm fine, thank you.

8 This is a defense motion to exclude breath test
9 results based on essentially what is faulty engineering
10 in the intoxalyzer having to do with the R.F.I
11 circuitry and detection. I have a witness. I'm ready
12 to go. However, I don't want -- What the State's
13 position is because, and I'll say this because on
14 Monday I had the same motion in front of Judge Robinson
15 and the State called the same witness, Deputy Zager.

16 THE COURT: You had Swope testify at that time?

17 MR. CANET: No, sir, for the following reason. At
18 that time, Deputy Zager in my presence told the State
19 it might be a good idea to get a C.M.I engineer here or
20 maybe a fellow from the D.O.T up in Baltimore, and
21 that's what the State decided to do in that courtroom.
22 I don't know if that's going to be the same here,
23 otherwise, I'm ready to go.

24 THE COURT: Did you have a chance to speak to the
25 prosecutor?

1 MR. HAGER: I did, Judge, and I talked to Lee
2 Cohen as well, and he wants to go forward with the
3 motion to the point where if it does need the engineer
4 here to testify, that's fine. I don't know how you
5 feel.

6 MR. CANET: Judge, if I may just for a minute. I
7 sort of object to that to proceeding that way on this
8 particular motion and I'll tell you why. That would be
9 the equivalent of the State being able to depose my
10 witness and then being able to, you know, rebut
11 everything that he has to say without the witness
12 actually testifying. To say that we want to hear what
13 his witness says and then we want to decide at that
14 point whether or not we want to rebut his testimony.

15 THE COURT: I don't believe there's anything wrong
16 with that. I bifurcate many times. If the State wants
17 to concede or add additional witnesses. I think
18 economy-wise put down whatever you want and go from
19 there. I don't think there's anything wrong with that.

20 MR. CANET: No, Judge, but by the same token --

21 THE COURT: Assuming they said, let's go on and
22 don't even mention Baltimore or whatever it is, and at
23 the end of the hearing decisions are made perhaps we
24 should bring somebody else in. I would let them.

25 MR. CANET: In that event, why don't they just

1 take Mr. Swope's deposition.

2 THE COURT: Good idea. Good idea, because that's
3 essentially what they want to do.

4 MR. CANET: What they want to do is me take his
5 deposition for them.

6 THE COURT: That's a good idea, too.

7 MR. HAGER: Judge, as far as this Motion to
8 Suppress, Defense has the burden under 3.190.

9 MR. CANET: I'm ready to proceed.

10 THE COURT: They are trying to make it easier.
11 They are bringing to the Court's attention the
12 procedure Judge Robinson used, which in my opinion is
13 probably quite reasonable. But the other thing is what
14 they might want to do is listen to the testimony, order
15 the transcript and send that up to the expert in
16 Baltimore.

17 MR. CANET: Under those circumstances, I simply
18 suggest they take his deposition. He's here. He's
19 available. They take his depo.

20 THE COURT: All those going to testify, come
21 forward. As a matter of fact, let me get everybody
22 else out of here first.

23 (Thereupon, other unrelated matters were
24 heard, after which the following proceedings
25 were had:)

1 THE COURT: Okay. Let's start on Reichenbaum.

2 MR. CANET: Judge, the Defense would call Mr. Rick
3 Swope.

4 Thereupon:

5 RICK SWOPE

6 was called as a witness and after having
7 been duly sworn, was examined and testified, as
8 follows:

9 DIRECT EXAMINATION

10 Q. (BY MR. CANET) Mr. Swope, would you state your full
11 name and occupation.

12 A. Rick Swope. I do primarily alcohol reconstruction
13 and testing of breath testing machines.

14 Q. Are you familiar with the Intoxalyzer 5000
15 manufactured by C.M.I?

16 A. Yes.

17 Q. How are you familiar with it?

18 A. I began with it in 1984. It was actually
19 certified in Florida '86 or '87, I'm not sure exactly. And
20 since then I worked in breath testing since 1974, but I'm
21 familiar with intoxalyzer, all three models. And I'm
22 working at F.I.U on the models, and I have two that I
23 maintain myself.

24 Q. Have you ever been a law enforcement officer?

25 A. Yes.

1 Q. In Broward County?

2 A. Yes.

3 Q. What years?

4 A. 1984 to 1990.

5 Q. With which agency?

6 A. Broward Sheriff's Office.

7 Q. Did you have an opportunity to come into contact
8 with the Intoxalyzer 5000?

9 A. Yes.

10 Q. In what capacity and what did you do?

11 A. I was certified to give breath tests. Obviously,
12 I had a card from H.R.S. I think it changed to F.D.L.E
13 whatever year that was. I worked with the machines the
14 entire time. I worked with Dave Fries initially getting
15 the machine tested for the State. I believe there were
16 three counties doing it at the time, and I worked on
17 assisting and maintenance and procedures. And I worked at
18 the Broward Police Academy for 10 years, and I maintained
19 the machines and that was the start of it.

20 Q. Have you ever taken any classes put on by C.M.I
21 itself?

22 A. Yes.

23 Q. What classes have you taken?

24 A. I took the repair and maintenance course in 19, I
25 think it was '85 or '86 in Colorado. That's where they

1 were at the time. I believe that was a two day class, and
2 then I took the State - they had a maintenance course that
3 was three days and the early updates.

4 Q. Have you ever taken the cover off an intoxalyzer?

5 A. All the time.

6 Q. Have you looked in it and recognize the different
7 components?

8 A. Probably all of them, most of them. There's
9 probably 160 components, but I recognize most of them.

10 Q. And you know what each component does?

11 A. Pretty much.

12 Q. Have you ever rendered opinions with respect to
13 the intoxalyzer in a courtroom before?

14 A. Yes.

15 Q. Are you familiar with a circuit or a device in an
16 intoxalyzer called an R.F.I detector.

17 A. Yes.

18 Q. What does R.F.I stand for?

19 A. Radio frequency interference.

20 Q. Why does an intoxalyzer have an R.F.I detector?

21 A. It's to pick up any radio waves or interference
22 that may come from phones, lights, generators, radios,
23 anything like that.

24 Q. Any sort of measurable energy wave?

25 A. Basically, anything that's measurable on a

1 frequency that an intoxalyzer would recognize as being
2 familiar.

3 Q. When an intoxalyzer measures a sample that is
4 blown into the sample chamber, what is exactly going on?

5 A. Basically, analyzing by infrared light the sample
6 of breath placed into the sample chamber. It's analyzed by
7 an infrared light and a reading comes out. The machine
8 has, obviously, many things going on at that time, but it's
9 actually capturing the breath sample. It's placed into the
10 chamber where infrared light goes through it and alcohol
11 appears on a certain frequency.

12 Q. Intoxalyzer has a breath chamber, right?

13 A. Yes.

14 Q. Which is where the breath is blown into and
15 captured?

16 A. It's captured in there and then pumped out.

17 Q. What is that one end of the breath chamber?

18 A. Light on one end and a filter wheel on the other.

19 Q. The light detector on the one end, what is that
20 supposed to do?

21 A. It just measures it, puts out a certain wave
22 length of light and it detects the difference of room air
23 or ambient air or ethanol that has alcohol in the air.

24 Q. It measures that?

25 A. It measures the difference.

1 Q. And it sends a signal to the processor board?

2 A. Yes.

3 Q. And that spits out a number associated with the
4 breath alcohol result?

5 A. Yes.

6 Q. That detector at the one end of the sample
7 chamber, can that thing distinguish between a fluctuation
8 in infrared light and radio waves?

9 A. It can during certain times, yes.

10 Q. When are those times?

11 A. During an air blank phase or during a phase where
12 the pressure switch is not in operation.

13 Q. After the pressure switch is in operation, what
14 happens?

15 A. Then that particular circuit is not able to detect
16 the fluctuation and energy. When I say that phase, that
17 would be during a test phase. That would be during the
18 breath phase when a subject blows into the machine. As
19 soon as the pressure switch is open, it would not be able
20 to detect whether it's alcohol or what the energy is that's
21 causing the machine to read that particular wave length.

22 Q. What is a pressure switch?

23 A. At the end of the breath hose where a person blows
24 into the machine and the machine takes the air in, so you
25 have to blow hard enough to open that pressure switch. If

1 you don't blow hard enough, the machine is not going to get
2 a sample of air.

3 Q. When that switch is triggered, the machine knows
4 it has to start measuring whatever is in the sample
5 chamber?

6 A. Yes, it begins to capture the sample and analyze
7 whatever is in the sample.

8 Q. Not only that, when that is triggered --

9 MR. HAGER: Objection. Ask a question, not
10 testify.

11 THE COURT: Overruled.

12 Q. (BY MR. CANET) That trigger has to start measuring
13 whatever --

14 MR. HAGER: Objection, Judge.

15 MR. CANET: It is a question, Judge.

16 THE COURT: Go ahead.

17 Q. (BY MR. CANET) That detector knows it has to start
18 measuring whatever energy waves are bombarding it, for lack
19 of a better term; is that right?

20 A. Yes.

21 Q. And that detector doesn't know if the energy waves
22 hitting it are coming from the sample chamber or some other
23 source?

24 A. That's correct.

25 Q. Does that mean an operator wouldn't know whether

1 or not his results are being effected by energy coming from
2 some other source?

3 A. They wouldn't know, at that point.

4 Q. What does C.M.I say about the radio frequency with
5 the inhibitor?

6 A. Basically, it says it works. And obviously, the
7 R.F.I detector is part of the breath tube or breath hose.
8 It also technically could be -- Technically, the R.F.I
9 indicator could be dismantled, meaning on the end of the
10 breath hose which is the heating tube which is heated as
11 well, the R.F.I is plugged into the side of the machine.
12 Technically, you could unplug that and get a valid reading
13 even though the R.F.I is not working. After a period of
14 time, the operator would know the hose is not warm up to
15 standards. You could unplug it, blow, and plug it back in
16 and the machine wouldn't know. There is no process to let
17 the operator know it is working or isn't working.

18 Q. Now, does C.M.I say the R.F.I works under any
19 circumstance?

20 A. They do, yes.

21 Q. Meaning, they are representing that this R.F.I
22 inhibitor would work whether or not the pressure switch is
23 triggered?

24 A. That would be my understanding in taking the
25 courses from them also.

1 Q. We know that's false?

2 A. Right.

3 Q. That is a misrepresentation on the part of C.M.I?

4 A. Yes.

5 Q. Do C.M.I. schematics -- Have you ever studied the
6 schematics for an intoxalyzer?

7 A. The ones we have in the books, the manuals.

8 Q. Is the inhibitor reflected or shown on those
9 schematics?

10 A. No.

11 Q. Is there anything in those schematics that
12 indicates a threshold for signal strength before the
13 inhibitor shuts the machine down?

14 A. Not that I can locate.

15 Q. If the inhibitor detects radio interference, it
16 will shut the machine down?

17 A. It will let the operator know there is an R.F.I
18 occurring and spit the card down.

19 Q. That will only happen if no one is blowing into
20 the machine?

21 A. Right, during the air blank phases.

22 Q. Keeping in mind how it is an intoxalyzer actually
23 performs a breath measurement mechanically, is it correct
24 to say that the R.F.I inhibitor necessarily cannot work
25 during the time somebody is blowing into this machine

1 because otherwise -- Do you understand the question?

2 A. Not exactly.

3 Q. The R.F.I, do you agree the R.F.I inhibitor
4 necessarily cannot work when somebody is blowing into the
5 machine because that detector is doing the same thing
6 during a breath measurement as it is during another source?

7 A. I agree.

8 Q. So that cannot work during the time somebody is
9 blowing into the machine?

10 A. That's correct.

11 Q. This means the breath results can be effected?

12 A. Sure, the breath results can be effected.

13 Q. To the detriment of anybody that blows into the
14 machine?

15 A. Yes.

16 Q. To their prejudice?

17 A. Yes.

18 MR. CANET: I have nothing further.

19 (Thereupon, other unrelated matters were
20 heard, after which the following proceedings
21 were had:)

22 THE COURT: On Reichenbaum, John, you may cross.

23 MR. CANET: May I ask two or three more questions
24 first?

25 THE COURT: Go ahead.

1 Q. (BY MR. CANET) Mr. Swope, you have been able to
2 note the location of the specific intoxalyzer used in this
3 case?

4 A. According to the report, 200 Northwest 27th
5 Avenue.

6 Q. That's the headquarters building?

7 A. Yes.

8 Q. That's where B.S.O main radio dispatch tower is?

9 A. Yes.

10 Q. And main dispatch equipment?

11 A. Yes.

12 Q. And B.S.O personnel that work throughout that
13 building?

14 A. I'm sure there are, yes.

15 Q. And carry personal communication units?

16 A. Yes.

17 Q. And those things are turned on?

18 A. Most likely, yeah.

19 Q. Now, you are also familiar with the operator's
20 manual for the Intoxalyzer 5000?

21 A. Yes.

22 Q. And on Page 57 of that manual, C.M.I talks about
23 radio frequency inhibition, and they say R.F.I high level
24 radio interference is present?

25 A. Yes.

1 Q. That's the term he uses, high level radio
2 interference.

3 MR. HAGER: There's no question, he's just
4 reading.

5 THE COURT: Go ahead.

6 THE WITNESS: Yes, that's the terms.

7 Q. (BY MR. CANET) We are not familiar as to what you
8 testified earlier what the threshold interference would be
9 for this to be triggered and flag the operator there is
10 interference going on?

11 A. Correct.

12 MR. CANET: Nothing further, Judge.

13 CROSS EXAMINATION

14 Q. (BY MR. CANET) I'm not really too familiar with
15 the C.M.I intoxalyzer and it's components, but what you are
16 asserting is the R.F.I inhibitor, that comes on if there's
17 radio interference?

18 A. The detector.

19 Q. And it's your testimony that the actual inhibitor
20 is disconnected while there's a breath sample being blown
21 through the chamber?

22 A. It's stating when the pressure switch is opened on
23 a blow only. In other words, when somebody is blowing, the
24 detector doesn't differentiate between a radio
25 interference, which may occur at the time, or the ethanol

1 in the chamber.

2 Q. How do you know this? Have you done studies?

3 A. We are currently attempting to find out what the
4 threshold level is. But we do it primarily, meaning me and
5 others working on the machine, do tests on police radios,
6 cell phones, and those type of things. We hook the machine
7 up to a simulator, and during the time we are testing we
8 make sure the signal, whether it be a cell phone or
9 whatever causes the machine to detect the interference.
10 And when you blow or check the pressure switch, the machine
11 is not able to differentiate between a radio wave length,
12 whether it be alcohol or some other type of signal coming
13 into the intoxalyzer only at that particular moment. It
14 works the rest of the time, it just doesn't pick up the
15 signal.

16 Q. It doesn't work the most crucial time when the
17 breath is coming through the chamber?

18 A. It works all the other time.

19 Q. Is it possible if there's two samples it would be
20 able to come in with compliance.

21 A. Ask that again.

22 Q. Is it possible, for instance, two samples to come
23 within compliance?

24 A. It would probably be unlikely that would occur,
25 although I can't give you an exact.

1 Q. So in this particular case if the samples were
2 .120 and .124, would those samples be in compliance?

3 A. Yes, under the statute.

4 Q. And if there was radio interference, it would be
5 unlikely two samples would come into compliance; is that
6 correct?

7 A. I agree with that statement, yes.

8 Q. Okay. So having known the results of the test in
9 this case, could it be your testimony that there was radio
10 interference if the two samples came within compliance?

11 A. No, I haven't really looked at that issue. The
12 only issue I looked at, I was asked to testify about the
13 radio frequency and the detector does not work during the
14 moment of the test.

15 Q. Two seconds ago I asked you if, when you take a
16 test and there is radio interference, would it be possible
17 to have two samples come within compliance.

18 A. It would be unlikely.

19 Q. In this case we had two samples.

20 A. Right.

21 Q. .120 and .124.

22 A. Right.

23 Q. And you stated they are both in compliance?

24 A. They are.

25 Q. In your opinion, would you say there was radio

1 interference with this breath test?

2 A. I would say it's unlikely, however, I do not know.
3 We have not been to the point of testing two samples. It
4 would be unlikely you would have two samples this close if
5 you have radio frequency on one sample and not the other.
6 I don't know for sure. My testing is only dealing with
7 radio frequency. It's unlikely it would be that close.

8 Q. It is unlikely there would be radio interference
9 with these two samples?

10 A. Correct.

11 Q. But they are in compliance?

12 A. They are.

13 Q. If the component was disconnected from the -- I'm
14 not familiar with the inner workings of the intoxalyzer,
15 but the component you are talking about, was that the hose?

16 A. Yes.

17 Q. What would occur?

18 A. Nothing.

19 Q. Nothing would occur?

20 A. No. If it was disconnected, the only thing that
21 would happen would be the breath tube, obviously, wouldn't
22 heat. But as far as the processing check the machine
23 itself wouldn't be able to determine the fact that it's
24 disconnected. It would still give you a reading.

25 Q. Does that hose serve as an antenna to the R.F.I?

1 A. Sure, that's where the radio interference is
2 through the tube.

3 Q. Is it likely or through your experience as a
4 deputy in the past -- Are you familiar with the BAT
5 Facility, the actual place where they take the defendants
6 down to be breath tested?

7 A. Pretty familiar, yes.

8 Q. Is it in your opinion or in your knowledge do they
9 have radios in that particular room that are turned on
10 during this test?

11 A. I couldn't say during this test. I can only go by
12 the past.

13 Q. In your experience?

14 A. A lot of times radios are on. A lot of times they
15 are told to turn them off. It depends on the individual
16 operator. A lot of experienced deputies or officers turn
17 their radios off, most officers do. Sometimes you forget.

18 Q. In the tests you are conducting on the C.M.I
19 intoxalyzers, are you taking those electronic cell phones
20 or radios and holding them right up to the intoxalyzer?

21 A. Some are within a couple of feet, some within 15,
22 20 feet, some are held within several feet of the machine.
23 That's usually where an officer stands, but I can't say
24 that all the time.

25 Q. Are you stating with all C.M.I Intoxalyzer 5000

1 Series that it's possible that every single breath test has
2 radio interference with it because of this?

3 A. Certainly not. Obviously not every test. It
4 would certainly be a minority of tests.

5 Q. In specific intoxalyzers?

6 A. Not specific ones. I would say it would depend on
7 the location or the officer. Some officers may have the
8 radio on, some may be transmitting, some may not be. I
9 would say it's a minority. I wouldn't say it occurs in
10 every or near every breath test.

11 Q. On December 2nd, 1999, were you present when David
12 Reichenbaum blew into the intoxalyzer?

13 A. No, I was not.

14 Q. Do you have any knowledge whether any radios were
15 on in the intoxalyzer room?

16 A. I have no knowledge of that.

17 Q. This is my last couple of questions for this.
18 Just to be clear, if there's radio interference, this is
19 your statement --

20 MR. CANET: Judge, asked and answered.

21 THE COURT: Overruled.

22 Q. (BY MR. HAGER) Just for my understanding. In your
23 opinion, if there was radio interference with a breath
24 test, it would be unlikely to have two breath samples come
25 to within compliance; is that correct?

1 A. Yes.

2 Q. Okay. And after telling you in this case and in
3 your opinion, only in your opinion after hearing of the
4 test 1.20 - I'm sorry, .120 and .124, those two tests are
5 in compliance?

6 A. They would be within the rules, yes.

7 Q. In your opinion, would there be radio interference
8 with these two samples?

9 A. I have no knowledge if there would or not, but the
10 tests are in compliance.

11 Q. Earlier you stated there was radio interference.

12 MR. CANET: I object. He's been through this
13 series of questions.

14 MR. HAGER: This is my last question.

15 THE WITNESS: I don't know for sure. It would be
16 unlikely.

17 REDIRECT EXAMINATION

18 Q. (BY MR. CANET) The questions you answered for the
19 prosecutor assumed that radio frequency is going to effect
20 one result and not the other; is that correct?

21 A. Right.

22 Q. If there is a constant wave of radio frequency
23 taking place below the threshold of which this machine can
24 register, both results can be effected?

25 A. They could be.

1 Q. Both results could be in compliance?

2 A. Yes.

3 Q. And the operator would never know?

4 A. Most likely, no.

5 Q. If you have an intoxalyzer sitting in a building,
6 constant radio wave taking place all the time, always
7 turned on, and that radio is sending a signal below the
8 threshold, every result obtained on that machine would be
9 effected?

10 A. Yes, if --

11 Q. Every single --

12 THE COURT: Excuse me. Let him finish his answer.
13 I think what he started to answer you cut him off.

14 MR. CANET: All right.

15 THE WITNESS: Yes, if the signal is low enough.

16 Q. And the machine does not detect it?

17 A. Yes.

18 Q. Every single result would be effected; is that
19 right?

20 A. If that occurs during that time, yes.

21 Q. So the prosecutor's hypothetical -- Let me get
22 this straight. His hypothetical assumed only one result
23 would be effected?

24 A. I assumed that's what he meant by the difference.

25 Q. And in this case, you don't know whether one

1 result was effected or both were effected?

2 A. No, I don't know.

3 Q. Both could have been effected?

4 A. They could have been.

5 Q. Both could have been in compliance?

6 A. Yes.

7 Q. Both could have been effected to the detriment of
8 Mr. Reichenbaum?

9 A. It could be, yes.

10 Q. Somebody who was an .079 might be a .124?

11 A. If the frequency is high enough to effect the
12 reading.

13 Q. And C.M.I never represented to anybody what the
14 threshold frequency strength is for this thing to detect
15 the interference?

16 A. Not that I know of.

17 Q. Their own literature, high level radio
18 interference, that's what they represented; is that right?

19 A. Yes.

20 Q. High level radio interference?

21 A. Yes.

22 MR. CANET: Nothing further.

23 THE COURT: Thank you. Anything further?

24 MR. HAGER: No questions of this witness, Judge.

25 State calls C.S.A Swadkins real briefly and Deputy

1 Zager briefly.

2 (Thereupon, other unrelated matters were
3 heard, after which the following proceedings
4 were had:)

5 THE COURT: Okay. Go ahead on Reichenbaum.

6 MR. HAGER: Judge, the State is not going to call
7 C.S.A Swadkins. We are going to call Deputy Zager.

8 Thereupon:

9 DEPUTY ZAGER

10 was called as a witness and after having
11 been duly sworn, was examined and testified, as
12 follows:

13 THE COURT: Go ahead, Deputy Zager.

14 DIRECT EXAMINATION

15 Q. (BY MR. HAGER) Deputy Zager, you heard Rick Swope
16 testify as to the C.M.I Intoxalyzer 5000, explain the
17 components. Are you familiar with the R.F.I inhibitor?

18 A. Sure.

19 Q. Can you explain how it actuality works.

20 A. As far as component level, as far as getting down
21 into what switches do what and how, that I would defer that
22 to some C.M.I engineer. I can tell you how we can test it
23 by putting a radio or doing something like that.

24 MR. CANET: I object then to any testimony being
25 offered by this witness.

1 THE COURT: Objection is noted. I'm going to take
2 it anyway.

3 Q. (BY MR. HAGER) You heard Rick Swope testify as far
4 as the components, the two breath level components being in
5 compliance with the radio frequency would be unlikely it
6 would be in compliance. Would that be pretty accurate,
7 they would be in compliance if there's no radio frequency?

8 A. Yeah, I think that's -- I heard it said if you had
9 a constant radio wave shooting through here, can you get
10 two samples. I mean, when would the radio wave stop? If
11 it kept going and going, at some point in time you are
12 going to get a radio interference.

13 Q. And with the actual hose of the R.F.I inhibitor,
14 if that was disconnected what would happen?

15 A. The hose is another external antenna. You can
16 take the hose off and the R.F.I won't be impacted. But if
17 you were to disconnect the circuit, the R.F.I potenometer
18 (phonetic) that you trip out the R.F.I, I broke one on my
19 gut, snapped it off on a training one, and if you
20 disconnect the actual circuitry you can't get the
21 instrument to boot up.

22 Q. Okay. So if the hose was taken off, it would go
23 into -- What would happen again?

24 A. You can disconnect the hose, but you can't give a
25 breath test without it. That's just an external antenna.

1 Some instruments have a little antenna on the back plus the
2 hose. The intoxalyzer has the R.F.I antenna built in, but
3 the case itself acts as an R.F.I shield and detector. It's
4 called a faraday (phonetic). That's what the case is
5 called. It has screens and meshes inside of it.

6 Q. You also heard testimony as far as there being
7 radio interference by the BAT facilities, by the radio
8 tower. There may be communications going on. You heard
9 Mr. Swope testify as to that it can effect. There can be a
10 constant depending upon the threshold. Both breath samples
11 can be effected in that way because of the radio frequency.
12 What is your opinion on that?

13 A. If we are shooting those kind of radio waves in
14 there, we'd be popping corn all day without a microwave.
15 As he said, if he alleges during the breath itself the most
16 crucial point when the R.F.I detector should be working,
17 but he says it works at other times when it's not in use or
18 when the air blank is going, at some point in time you are
19 going to see radio interference if you have this constant
20 going through the analyzing.

21 Q. You are saying the intoxalyzer would be alerted by
22 the R.F.I indicator light?

23 A. If there was enough signal present to cause the
24 detector to go off it would simply say R.F.I inhibited, and
25 that happens from time to time.

1 Q. Even the hose if it serves as an antenna?

2 A. You can disconnect the hose and get R.F.I to work.

3 MR. HAGER: No further questions of this witness.

4 CROSS EXAMINATION

5 Q. (BY MR. CANET) Deputy Zager, in response to the
6 question about what if there's a constant radio wave
7 passing through the room where the machine is located, you
8 said at some point you will get R.F.I, right?

9 A. What I'm saying is --

10 Q. Let's go back to your response earlier. Your
11 response earlier was at some point you will get R.F.I.
12 That was your response?

13 A. Yes.

14 Q. When?

15 A. Well, if you are saying I have to only put it in
16 the context of your argument.

17 Q. I'm just asking when. When is that point?

18 A. When there's enough R.F.I present.

19 Q. When is enough?

20 A. I don't know the answer to that.

21 Q. Does anybody know the answer to that?

22 A. I'm sure Dr. Art Flores who tests these things and
23 certifies them.

24 Q. But right now you don't have an answer?

25 A. I don't.

1 Q. And you don't know if there's radio waves right
2 now effecting results obtained on the intoxalyzer?

3 A. I can assure you there's none.

4 Q. If you don't know what the threshold level is, how
5 can you assure us?

6 A. I've blown into those instruments many, many, many
7 times at zeros and used simulators hundreds and hundreds of
8 times at all the locations.

9 Q. If the machine is not flogging R.F.I because it's
10 below the threshold, how would you still know?

11 A. I tested the solutions at various locations. I
12 tested myself. I know I'm at zero when I go to work. I
13 don't drive around at any levels.

14 Q. However, if the amount of frequency is below this
15 threshold that no one seems to know today, how would you
16 know?

17 A. It's not a problem.

18 Q. How do you know below the threshold for radio
19 interference isn't also an amount of energy that's going to
20 effect a breath result?

21 A. There would be nothing obtained. You would have
22 zeros. We get many, many cases where individuals are
23 arrested and they blow zero.

24 Q. What about the threshold .02, just an .02 before
25 the machine will flag R.F.I?

1 A. You are putting the threshold in the context of a
2 breath alcohol analyzation.

3 Q. Exactly.

4 A. I thought we were talking about the radio
5 frequency.

6 Q. And the radio frequency. That energy can be
7 reflected as a breath alcohol result?

8 A. I don't know how you can do that without setting
9 off some detector.

10 Q. What if the detector doesn't work at the time
11 someone is blowing into the machine?

12 A. That's the most crucial phase when the detector
13 should be working. It would be nonsense to have an
14 instrument that didn't detect through that phase. It would
15 be like having a smoke detector, when there isn't a fire
16 let's turn it off.

17 Q. The way the machine renders a breath result by
18 reading a fluctuation in an energy wave of an electrical
19 detector at the end of a sample chamber, right?

20 A. Uh-huh.

21 Q. Doesn't that necessarily mean that R.F.I inhibitor
22 has to be switched on at that moment?

23 A. The R.F.I detector?

24 Q. Doesn't it necessarily mean it has to be switched
25 off at that moment, because if it wasn't, this machine

1 would not be able to measure the changes or the
2 fluctuations in infrared light?

3 A. Again, the same response. I can't fathom why
4 anybody would turn off the detector at the point in time
5 when it's most needed.

6 Q. And your best response is, you can't understand
7 it?

8 A. I can't tell you on a component level because I'm
9 not the engineer that designed this thing to tell you that
10 that circuit breaks off when an individual trips the
11 pressure switch. It requires an engineer.

12 Q. In any of your training, in any of the extensive
13 training you've received while being with B.S.O on the
14 Intoxalyzer 5000, have you ever been made aware that
15 electronical detector can tell the difference between
16 energy waves coming from infrared light or energy waves
17 coming from a radio cell phone or any other radio source?

18 A. Energy is energy if you can get enough in there
19 and cause some type of fluctuation.

20 Q. Does that mean, no, you have never been made aware
21 the detector inside the intoxalyzer can tell the difference
22 of energy received from infrared light or any other source?

23 A. I can tell you this, it's designed to detect
24 infrared light. However, if you have some type of voltage
25 fluctuation, if you have something out of calibration, if

1 you have something that's not working correctly, and we've
2 had this happen, you can get goofy readings. You can get
3 inappropriate readings. And at those points in time, I
4 certified those instruments not to be working correctly.

5 Q. So at that point in time, the R.F.I inhibitor
6 wasn't working?

7 A. These weren't R.F.I problems. I'm talking about
8 voltages in and of itself whether or not one component was
9 to go bad, whether it be a motor that spins the wheel that
10 chops up the frequency.

11 Q. Do you know how it is that R.F.I works on the
12 intoxalyzer?

13 A. Well, if you are talking again at a component
14 level dealing with actual switches on the circuit board
15 from an engineering standpoint, I can't tell you.

16 Q. You don't know?

17 A. I can tell you how we trigger it by use of radios
18 and to that degree. I can tell you how to trim out
19 components on there.

20 Q. Otherwise, you don't know?

21 A. No, I would defer that to an engineer from the
22 factory.

23 MR. CANET: I have no other questions.

24 MR. HAGER: Judge, we will supplement our
25 discovery. We have three individuals we'll bring down

1 from C.M.I.

2 THE COURT: That sounds fun. Perhaps we can
3 coordinate this in front of Judge Robinson.

4 MR. CANET: I ask the Court permitted on one
5 thing, that I can be permitted to recall Rick Swope if
6 it becomes necessary.

7 MR. HAGER: As well as Deputy Zager.

8 THE COURT: Of course. That's why I bifurcate
9 these things.

10 (Thereupon, the hearing was concluded.)

11

12

C E R T I F I C A T E

13

14

STATE OF FLORIDA)

15

COUNTY OF BROWARD)

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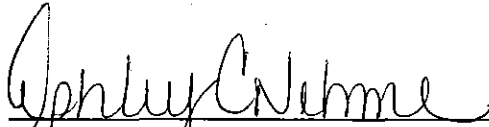
17 I, ASHLEY C. NEHME, Court Reporter, certify
18 that I was authorized to and did stenographically
19 report the foregoing proceedings and that the
transcript is a true and complete record of my
stenographic notes.

20

Dated this 5th day of September, 2000.

21

22


ASHLEY C. NEHME,
Court Reporter

23

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