

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

MARSHALL COUNTY, ILLINOIS

THE PEOPLE OF THE
STATE OF ILLINOIS,

Plaintiff,

vs.

MARK

Defendant.

Case No. 97 DT 36

JURY TRIAL

REPORT OF PROCEEDINGS of the Jury Trial had before
the HONORABLE SCOTT A. SHORE, Judge of said Court, on the
25th day of August, 1998.

APPEARANCES:

MR. DONALD K. KNUCKEY,
State's Attorney of Marshall County
For the People of the State of Illinois;

MR. JOSEPH GIBSON,
Attorney at Law
For the Defendant.

REPORTED BY:
GAIL J. LONG, CSR
Official Court Reporter
Tenth Judicial Circuit
State of Illinois
Cert. No. 84-2708

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Breath Alcohol Testing Section

1 (Whereupon the following
2 proceedings were duly
3 had:.)

4 *****

5 MR. GIBSON: Before I begin, your Honor, let me get an
6 exhibit.

7 RICK SWOPE,
8 called as a witness on behalf of the Defendant, having been
9 first duly sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. GIBSON:

12 Q Now, would you state your name, please?

13 A My name is Rick Swope, S-w-o-p-e.

14 Q And what is your age, Mr. Swope?

15 A I am 42.

16 Q And what is your educational background?

17 A I was a police officer for 15 years. The last six
18 years I was with the Broward County Sheriff's Office in Ft.
19 Lauderdale. For six years I was the administrative
20 coordinator. I was in charge of the DUI task force.

21 I have a Bachelor's Degree in criminal justice
22 from St. Thomas University, Master of Science Degree in
23 technology of engineering from the University of Miami.

24 I have a permit to teach police officers from the

1 federal government issued by the National Highway Traffic
2 Safety Administration.

3 I am an instructor in the State of Florida. I
4 ~~am not a certified instructor~~ I am allowed to teach nationally,
5 and I can teach at the school board level or educational
6 level.

7 I have had over 2000 hours of training involving
8 the Intoxilyzer or breathalyzer equipment. There is
9 different models of breath testing devices.

10 I have my own company. I have an office in
11 Atlanta and Davie, Florida, which is outside of Ft.
12 Lauderdale.

13 I part own several different models of
14 Intoxilyzers, same type of breath testing device used in
15 this case.

16 I do seminars around the country involving either
17 teaching police officers or attorneys or whoever attends in
18 the field of breath testing.

19 I have written various articles involving breath
20 testing and breath testing procedures.

21 I am currently working on a grant at Florida
22 University. It's a federal grant where the Intoxilyzer is
23 being tested on a variety of circumstances. I am on that
24 particular committee or experimental committee. I do the

1 maintenance and make sure the machine is basically in order
2 to prepare for any testing that is done. I have to certify
3 that the machine is okay for testing and the various
4 experiments are run.

5 I am also on a committee or on staff doing
6 teaching with Dr. Dick Jenson out of Minnesota, and we teach
7 the only Intoxilyzer course that is done nationally. In
8 other words, this Intoxilyzer course is put out nationally.
9 Pretty much attorneys attend, prosecutors and defense
10 attorneys attend. What we do is we have a number of
11 machines, and they actually get to work with the machine for
12 a one-week period. The course is a 40-hour, pretty
13 intensive course, and I also do various experiments, and I
14 testify for both the prosecution and defense involving
15 Intoxilyzers, depending on what the issue is, of course.

16 Q For how many years have you been involved with
17 breath testing equipment?

18 A Since 1974.

19 Q So that's 24 years?

20 A Right. I got in it pretty early.

21 Q Let me ask you, sir, have you been certified by
22 the State of Florida to be an Intoxilyzer operator?

23 A Yes. Well, I was when I was a police officer.
24 There really is no certification. The states have their own

1 certification, so actually it's a permitting, not really
2 certification. There is really no certification itself.

3 Q In any event, did you take a basic course in order
4 to get that permit?

5 A Right.

6 Q Did that include hands-on operation of the
7 equipment?

8 A Yes, sir.

9 Q Now, you used a phrase a few minutes ago, [REDACTED]
10 When you use that phrase, what are you referring to?

11 A I am referring to the National Highway Traffic
12 Safety Administration. They are a branch of the federal
13 government, and basically they are kind of like an authority
14 on anything to do with motor vehicles, highway safety, that
15 kind of stuff.

16 Q When you say you have a permit or license or
17 certification from them, once again did you have to take a
18 certain course of study in order to obtain that?

19 A You had to be selected for that course at that
20 time. I don't know what the qualifications are today, but
21 at that time you had to be asked to be in that group, and I
22 was asked, and I was accepted.

23 You do an application procedure, and then you have
24 to pass a number and series of tests. Once you do that,

1 then you are allowed to get your permit nationally.

2 Q So the State of Florida allows you to train police
3 officers?

4 A Right.

5 Q And the National Highway-Traffic Safety
6 Administration allows you to train police officers?

7 A Right. In all 50 states, right.

8 Q In the operation of breath testing devices?

9 A That's correct.

10 Q Could you tell the jury how many police officers
11 over the last 24 years you have trained to operate breath
12 testing equipment?

13 A I have probably taught in the area of either
14 breath testing or field sobriety issues probably maybe 4,000
15 officers, probably, something like that. Well over 3,000,
16 probably close to four.

17 Q I am afraid I limited myself too much a moment
18 ago. You are permitted by the State of Florida and the
19 federal government to train officers in field sobriety
20 testing?

21 A That's correct.

22 Q And have you been qualified as an expert in the
23 State of Illinois, the courts of the State of Illinois to
24 testify about breath test related issues?

1 A Yes.

2 Q How many times would you say?

3 A I don't know. In the last couple of years,
4 probably five or six minimum, maybe more.

5 Q Have you been qualified in the courts of the State
6 of Illinois to testify as an expert in the question of field
7 sobriety testing?

8 A Yes.

9 Q Have you had occasion to conduct your own study in
10 terms of field sobriety testing and its efficacy?

11 A Yes.

12 Q Have you been qualified as an expert in federal
13 court to testify as an expert in breath test and field
14 testing?

15 A Yes, sir.

16 Q How many other states would you say you qualified
17 as an expert?

18 A Twenty-two.

19 Q Let me ask you, sir, are you familiar with the
20 model of machine, the Intoxilyzer Model 5000?

21 A Well, I am familiar with the model. There is
22 different series, but, yes, I am familiar.

23 Q And, in fact, do you own or part owner of an
24 Intoxilyzer 5000?

1 MR. KNUCKEY: For the record, this is a Series 64.

2 MR. GIBSON: I was getting to that.

3 THE COURT: I don't know if that has been shown, but I
4 will allow counsel to direct his own examination.

5 MR. GIBSON: Thank you, Judge.

6 BY MR. GIBSON:

7 Q Are you owner or part owner of an Intoxilyzer
8 5000?

9 A I am part owner, specifically myself, and I
10 maintain others also, but I am part owner of two.

11 Q Have you had experience in maintaining a Series
12 64, Model 5000?

13 A Yes. That's one I am a part owner of, Series 64.

14 Q Now --

15 THE COURT: Counsel both approach.

16 (A discussion was held at
17 the bench between Court
18 and counsel and off the
19 record.)

20 BY MR. GIBSON:

21 Q Let me show you, sir, People's Exhibit 3.

22 MR. KNUCKEY: We will stipulate, Judge, it's a Model
23 64, and it is printed on the ticket.

24 THE COURT: Okay.

1 BY MR. GIBSON:

2 Q It's shown on the ticket; is that correct?

3 A Yes.

4 Q Now, tell me, sir, is there a model that was
5 manufactured -- is it CMI that manufactures this device?

6 A Yes, that's correct.

7 Q And you have been to the school put on by CMI
8 about its^v product?

9 A Yes. I have been to the factory and saw how they
10 were built and how they were made.

11 Q Kept up on the literature about the various models
12 produced by CMI?

13 A Yes. I get updates all the time, and I pretty --
14 in this field you have to stay up-to-date so you get course
15 material all the time.

16 Q Is there a model or a series that has been put out
17 by CMI after the Series 64?

18 A Yes.

19 Q Now, let me ask you a hypothetical question, Mr.
20 Swope. If the evidence in this case, as we all now know, is
21 that the breath testing device used was a Series 64,
22 Intoxilyzer 5000, and if the evidence in this case was that
23 the person being tested may have earlier in the day been
24 exposed to or inhaled toluene, would you have an opinion as

1 to whether the inhalation of toluene may tend to askew the
2 results of the tests later on in the day?

3 A I would have an opinion, yes.

4 Q What would that opinion be, sir?

5 A It would be that it can-affect the results of the
6 reading, and if that chemical was present, it would inflate
7 the reading definitely.

8 Q Did you say inflate the reading?

9 A Absolutely.

10 Q How can that be?

11 A Well, first of all --

12 MR. KNUCKEY: Your Honor, I object unless we have a
13 foundation for that opinion.

14 THE COURT: Sustained.

15 BY MR. GIBSON:

16 Q Are you familiar with literature or experiments or
17 incidents that would cause you to opine that toluene could
18 inflate the reading in a Series 64, Intoxilyzer 5000?

19 A All three of those, yes.

20 Q When you say literature, what in the literature
21 causes you to opine in that fashion?

22 A The literature --

23 MR. KNUCKEY: I object, your Honor, I would like to
24 know the author, the publication. I have in front of me

1 such documents. We don't -- literature is something we have
2 down at the library, and it is compartmentalized by books
3 with names on the front.

4 THE COURT: That will first be subject to the testimony
5 because the question now is what literature, and, second, I
6 will make a determination whether that's sufficient
7 foundation, and if it is it goes to weight and it's the
8 subject of cross-examination on the same subject. So the
9 first question is what literature?

10 MR. GIBSON: That's correct.

11 THE WITNESS: There is various literature. One author
12 is Dr. Dick Jenson out of Minnesota. That would be under a
13 paper titled "Interfering in Testing." Dr. Dubowski
14 involving interferences with the machine, and literature from
15 CMI itself involving toluene affecting the machine.

16 The literature from the company indicated it
17 affected it so much that they changed the design of their
18 machine, and the new models have a toluene detector on it,
19 so it affected it that much that the company changed the
20 machine itself to pick up that chemical.

21 MR. KNUCKEY: We would ask it be stricken unless we
22 know the publication he refers to. This lame reference
23 which can't be designated by --

24 THE COURT: By --

1 MR. KNUCKEY: He doesn't tell us where it was
2 published, when. Was it published in 1851, 1951?

3 MR. GIBSON: I was about to ask when it was published.

4 THE COURT: I will hold off on ruling until you
5 complete your foundation, and when you are done, you can ask
6 for my ruling.

7 MR. GIBSON: Thank you, sir.

8 BY MR. GIBSON:

9 Q Now, a moment ago you said there was literature
10 from CMI?

11 A Right.

12 Q Suggesting toluene as an interferent. Can you
13 tell us when that would have been published?

14 A It would have been published sometime in 1992
15 because '93 is when the changes were made to the machine,
16 late '93 and early '94. The reason that I know roughly the
17 date is because the machines that I had in service, and I
18 was in charge of six, had similar problems in certain areas,
19 and that's another area.

20 Q Stick to literature.

21 A So the literature from Dr. Kirk Dubowski, the most
22 current article I am aware of is 1986 article on
23 interferent. There is a 1981 article from Dr. Dubowski on
24 interferent.

1 MR. KNUCKEY: Spelling?

2 THE WITNESS: D-u-b-o-w-s-k-i. All of his papers
3 originate from Oklahoma. He has written probably, I am just
4 guessing, maybe 75 to a hundred different articles dealing
5 with the machine. He is probably one of the experts in it.

6 BY MR. GIBSON:

7 Q Let me interrupt for a second. The literature
8 from CMI is what I am really interested in. Did you say
9 that would be in '92?

10 A Either -- somewhere around '92, maybe late '91.
11 Again that was because of things coming in from other
12 departments about problems with the machine.

13 Q Would there have been a specific title of the
14 literature that would have come out from the manufacturer in
15 1991, '92?

16 A I suppose. I don't recall. All the articles I
17 don't recall what the title was. I know they only dealt
18 with certain issues. I don't remember the titles. I read
19 150 papers a year. I don't know what all the titles are.

20 MR. KNUCKEY: On a matter of this importance and an
21 issue as narrow as this, not to know is tantamount to does
22 not exist. How can I cross-examine the veracity of this if
23 he doesn't know where it is published, when it is published.

24 THE COURT: Ruling of the Court on this is that an

1 expert in a particular area is able to show where he
2 obtained his information sufficiently to show that there was
3 a basis for it that would be recognized within that area of
4 science or expertise, and if he is able to do that, then he
5 is able to express an opinion based upon that knowledge that
6 he has in the field.

7 For instance, if he were to have taken a course,
8 it's necessary that we know that there was a course on the
9 subject but not how many people were in the room or who was
10 teaching the course at the time or what papers were handed
11 out as part of the course.

12 The issue that is raised by the objection goes to
13 the weight given to the testimony, the credibility to be
14 assigned to the testimony, and the possibility of cross-
15 examination or rebuttal evidence, but not the admissibility,
16 so I will allow the admissibility, and you may proceed.

17 MR. GIBSON: Thank you, your Honor.

18 BY MR. GIBSON:

19 Q A moment ago you said there was some practical
20 experience that you had that led to your opinion that
21 toluene can be a potential interferent and inflate the
22 result of the breath testing device. When would that
23 experience have occurred?

24 A The first time it occurred was in 1987. It would

1 be when I was doing the testing with the machines.

2 Q And where would this event be?

3 A That would be in Florida. My job was to select
4 sites around the area county to place Intoxilyzers for
5 breath testing. Because I was with the sheriff's office, we
6 basically did all the breath testing in the county. All the
7 people were brought to county facilities, and my job was to
8 go to various areas of the county and pick out sites so we
9 can put our machines there and save officers' time.

10 When they picked up a DUI subject, rather than
11 driving an hour, they could drive ten minutes.

12 I selected six different sites around the county,
13 and a couple of the machines we continually had problems
14 with. They would read interferent or extremely high to some
15 of the maximums. In other words, they would read the max.
16 In other words, point four. They would read way off.

17 We continued to have problems, and finally through
18 trial and error and through dealing with the manufacturer
19 after sending machines back and forth, they indicated that
20 the problem could be some kind of chemical interference, and
21 it proved to be toluene. That was found out.

22 The rooms that the machines were in, because they
23 were new rooms for us, had been freshly painted, and that
24 caused a problem, and that's how we eliminated the problem.

1 Q Removed them out of the freshly painted room?

2 A That's right, and that solved the problem. Then
3 after several weeks, we put it back, and it was fine. We
4 found that was the problem, and the manufacturer tipped us
5 off to that originally.

6 Q Now, is there anything else in your background,
7 experience, and knowledge as an expert witness that leads
8 you to your opinion that toluene can be a potential
9 interferent and inflate a breath testing device result?

10 A Yes.

11 Q What is that?

12 A The testing committee that I told the jury that I
13 am on, when we test the machines, there are various
14 chemicals we test all the time, toluene, acid aldehyde -- I
15 am probably saying some of it incorrectly -- we run across
16 all kind of chemicals that people say they ingest or that
17 they smell or they have in their system, so we attempt to
18 take those chemicals and introduce them into a simulator and
19 introduce them into the machine, and the purpose is to find
20 out what reacts and what doesn't.

21 I have had people tell me they were caught
22 siphoning gas by the police and they charge them with DUI.
23 Sometimes we blow up the machine, and sometimes we get an
24 interferent, and sometimes we see that the reading rises,

1 and the purpose of that is that it's a controlled test. I
2 know what I am doing. I know that the subject matter I
3 introduce in the machine is at the level we put in it.

4 Q So these are actual experiments?

5 A Correct.

6 Q From the -- by the way, how many years have you
7 done these experiments?

8 A I have done them from '74 on, but with the
9 Intoxilyzer I have done primarily experiments from 1990 to
10 the present. That's when I really started doing
11 experiments.

12 Q Intoxilyzer 5000, Series 64?

13 A Right, 64, 66, and 68.

14 Q Did I hear you say the 66 and 68 series have the
15 new filters for toluene?

16 A No, the 68 series does. That was updated, like I
17 said, in '93.

18 Q From the experiments you have done and the
19 literature you referenced, from the experience you told us
20 about when you were at the sheriff's department, have these
21 confirmed the opinion you have given us here today that
22 toluene in a Series 64 can be a significant interferent?

23 MR. KNUCKEY: Your Honor, I object once again. This
24 hypothetical that was originally posed by counsel forgot one

1 significant element. The individual hadn't been exposed to
2 the toluene for six hours.

3 THE COURT: Sustained on that. If you would rephrase
4 your hypothetical now.

5 BY MR. GIBSON:

6 Q If the evidence in this case, sir, indicated that
7 six hours prior to the breath testing the individual that
8 was to be tested was exposed to toluene, if the evidence in
9 this case were that the testing device was a 5000, Series
10 64, would you have an opinion as to whether the toluene
11 could be a potential interferent?

12 A It could be a potential interferent. I can't tell
13 you time wise, but it's an interferent.

14 Q Would it have to be present in large amounts to be
15 an interferent?

16 A No, extremely small amounts, very small.

17 Q Let me ask you about field sobriety testing.

18 A Sure.

19 Q How many officers would you say you have trained
20 in standard field sobriety testing?

21 A Over 7,000.

22 Q And the instructions let's say for the walk-and-
23 turn, are those pretty much standardized in your experience?

24 A Yes.

1 Q And if the evidence in this case were that the
2 officer requested ten steps with the first step being to ask
3 the individual simply to stand heel-to-toe, is that -- do
4 you have an opinion as to whether or not that would conform
5 with standard field sobriety testing?

6 MR. KNUCKEY: Your Honor, there is no showing that
7 there is a standard and if that standard is with the
8 Department of Public Health in the State of Illinois.

9 THE COURT: Sustained.

10 BY MR. GIBSON:

11 Q Let me ask you, sir, this question. How many
12 breath tests would you say you have done?

13 A You mean on subjects or breath tests in general?

14 Q Let's start with subjects.

15 A Probably, I am just guessing, maybe actual people
16 under arrest, maybe 1500. I probably -- including
17 experimental tests and volunteers and things like that,
18 probably eight, 9,000 easy. Probably many more than that.

19 Q Large part of your career is an attempt to discern
20 how much alcohol may be present in a person's breath or
21 blood at any given time?

22 A Right. That's pretty much what we do in most
23 cases, yes.

24 Q And when you do that, sir, what methodology do you

1 employ?

2 A Well, the methodology really -- there is a formula
3 called the Widmark (phonetic) formula. It's a formula
4 involving the person's weight, alcohol consumption over a
5 period of time, and there are other factors involved in the
6 formula. Of course, you usually start off with just a
7 number of drinks and you can figure it out, or you start off
8 with a number.

9 In other words, in many cases the number on the
10 Intoxilyzer is used to extrapolate back.

11 Q The Widmark formula, is it generally accepted in
12 the community of individuals who are attempting to discern
13 how much alcohol may be present in a person's breath or
14 blood?

15 A Yes. It is used by pretty much everyone, I think.

16 Q Now, have you had occasion to take the factors of
17 the Widmark formula, height, weight, how much alcohol over a
18 given point in time, and then confirm whether the Widmark
19 formula gives you an accurate reading by using breath,
20 blood, and urine testing?

21 A That's correct.

22 Q Have those methods of testing confirmed for you
23 the accuracy of the Widmark formula?

24 A Yes. In probably 95 percent of the cases, yeah.

1 Q Do you have an opinion, sir, from your training,
2 experience, or expertise as to whether the alcohol is
3 generally absorbed in a pretty much routine fashion by
4 individuals?

5 A Well, by routine you mean generally over a course
6 of time? That's correct. No matter how much you drink at
7 once, it can only get into your system so fast. It has to
8 get through your stomach into your intestines and
9 bloodstream before it affects you.

10 Just to give you an example so the jury is clear,
11 if I sat here and drank a gallon of whiskey right now, drank
12 it down, I probably wouldn't show anything test wise for the
13 next half hour. It has to get into my stomach and --

14 Q You said the next half hour?

15 A Yeah.

16 Q Go ahead.

17 A It's in my stomach. Until it gets through my
18 stomach and stomach wall and intestines, it is just there.
19 It takes a little while to be affected. It doesn't
20 immediately affect you when you have one sip, and that's
21 what I mean by the delay time.

22 Q Can I ask you a hypothetical question?

23 A Sure.

24 Q If the testimony in this case were Mr. Stewart

1 weighed 185 pounds on October 17, 1997, and that in the half
2 hour between approximately eight p.m. and 8:30 he had
3 ingested alcohol, is it possible using the Widmark formula
4 and your experience and your expertise to tell us at what
5 rate he would have to consume alcohol in order to be found
6 to be a .14 at 2209 that evening?

7 A Which is ten o'clock, right, 10:09?

8 Q v Right.

9 A Yes, I figured that out. I already spoke with you
10 about that, so I figured that out.

11 Q And at what rate would he have to drink during
12 that half hour to score a .14 at 2209?

13 A Well, he would have to have either a shot or a
14 beer about every two-and-a-half minutes for that 30-minute
15 period to be at that level at 10:09.

16 Q When you do breath testing, is there a particular
17 method that you employ in trying to discern how much alcohol
-18- may be in a person's breath or blood?

19 A Sure.

20 Q And what methodology do you employ, sir?

21 A Well, obviously for testing purposes we use the
22 Widmark formula and elimination formulas which are roughly
23 the same as the Widmark, and then, of course, we do testing
24 with people that actually drink, volunteers for us, and we

1 match that with what they had.

2 Q I am expressing myself poorly. It's been a long
3 day.

4 When you do breath testing to attempt to see how
5 much alcohol may be in a person's blood or breath, how many
6 tests do you do?

7 A I do a minimum of two.

8 Q And is there a particular reason for doing that?

9 A Yes.

10 Q And what is that reason?

11 A Well, it's known as reliability. In other words,
12 I want to make sure that the first thing I did matches the
13 second thing. I want to make sure that the first test I
14 did -- actually, I mean, terminology for me anyway is that
15 one -- a test consists of -- actually the definition of a
16 test is two or more.

17 MR. KNUCKEY: I object, Judge.

18 THE COURT: Sustained. Stricken.

19 MR. KNUCKEY: In the State of Illinois, that's not a
20 test.

21 BY MR. GIBSON:

22 Q You realize that's not true in Illinois, don't
23 you?

24 A You asked me what I do. I am not saying --

1 THE COURT: What is stricken is the definition of t
2 word test, and the jury is to disregard the witness's
3 definition of the word test because it does not apply here
4 or anywhere in the State of Illinois.

5 BY MR. GIBSON:

6 Q Now, I think I have only one other question for
7 you, sir. I notice on People's Exhibit 3 it says, "Air
8 blank, .00"?

9 A Yes, sir.

10 Q Does the Intoxilyzer 5000, Series 64, when it does
11 that air blank, does it test the room air for potential
12 interferences?

13 A No.

14 Q Does it conduct a room air analysis?

15 A No.

16 Q When you say that you employ a confirming test, is
17 that a time consuming proposition?

18 A No.

19 Q How difficult is it?

20 A It takes about 30 seconds to 60 seconds to run a
21 second test on this particular model machine.

22 MR. GIBSON: No other questions..

23 THE WITNESS: Thank you, sir.

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CROSS-EXAMINATION

BY MR. KNUCKEY:

Q Would you know how those machines are certified by the State of Illinois?

A Just from what I read. That's all I know.

Q How are they certified?

A Originally the machine was brought into question --

Q Just answer. How many tests are certified by the Department of Public Health?

A I believe initially it was 50.

Q At least two, correct?

A No. It was 50 to get the machine certified. Your question was certified by Illinois. There was a 50 test run procedure by your state.

Q Did you prepare your testimony before you came here today?

A I never prepare my testimony. I prepare myself so I know what the case is about. I talked to Mr. Gibson obviously about it. I talked to the defendant about it as well. I look up certain materials depending on the case, so I do prepare myself, yes, sir.

Q You knew one of the issues in this case would be the effect of toluene on an Intoxilyzer 5000, Series 64?