

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

STATE OF FLORIDA, : CASE NO. 98-033292MM10A  
: JUDGE ROBERT S. ZACK  
:   
v. :   
CHERYL ANN BUSHEFF, :   
Defendant. :   
-----

The above-entitled cause came on trial before  
the Honorable ROBERT S. ZACK, Presiding Judge, at Broward  
County Courthouse, 201 Southeast Sixth Street, Room 344,  
Fort Lauderdale, Broward County, Florida, on the 2nd day  
of June, 1999, commencing at 9:00 a.m..

---  
JURY TRIAL (EXCERPT)  
---

ORIGINAL

APPEARANCES:  
MICHAEL J. SATZ, STATE ATTORNEY'S OFFICE,  
BY: MARCIE ZACCOR, ESQUIRE  
ASSISTANT STATE ATTORNEY  
Appearing on behalf of the State of Florida.  
  
ROBERT DAVID MALOVE, ESQUIRE  
Appearing on behalf of the Defendant.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

<u>PLAINTIFF WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
RICK SWOPE			
By Mr. Malove	3, 13		44
By Ms. Zaccor		7, 25	

1 Thereupon, the following proceedings were had:

2 \*\*\*\*\*

3 THE COURT: Good morning, ladies and gentlemen.  
4 The State has rested their case. Defense, care to put  
5 on any testimony or call any witnesses?

6 MR. MALOVE: Judge, we call Rick Swope.

7 THE CLERK: Raise your right hand, please.

8 - - -

9 WHEREUPON,

10 RICK SWOPE

11 being first duly sworn to testify the whole truth, as  
12 hereinafter certified, testified as follows:

13 THE WITNESS: I do.

14 THE CLERK: Be seated. Please state your name  
15 and spell your last name for the record?

16 THE WITNESS: My name is Rick Swope. S-w-o-p-e.

17 DIRECT EXAMINATION

18 BY MR. MALOVE:

19 Q What do you do?

20 A I have my own business. I do primarily accident  
21 reconstruction. I also do some consulting and writing in  
22 the area of DUI field sobriety exercises. And I also do  
23 some studies involving breath machines. Primarily, the  
24 intoxylizer series.

25 There are three different machines with that

1 series that I work with.

2 Q Are you charging for your services today?

3 A Yes.

4 Q What is your educational background?

5 A I was a police officer for 15 years. The last six  
6 years I was with the Broward County Sheriff's Office,  
7 Traffic Homicide and DUI Division.

8 I have a Bachelor's degree in Criminal Justice  
9 from Saint Thomas University. I have a Master's of Science  
10 degree in Technology and Engineering from the University of  
11 Miami. I am also an instructor for the National Highway  
12 Traffic Safety Administration. I also have instructional  
13 certifications to teach in the State of Florida for the  
14 Criminal Justice Standards and Training Commission. And I  
15 also have qualifications to teach in college if I wish, or  
16 high-schools.

17 Q Have you done any instructions with respect to the  
18 field sobriety exercises?

19 A Yes.

20 Q How about the operation of the Intoxylizer 5000  
21 series?

22 A Yes. I have been involved in quite a few studies.  
23 I've been involved now currently with a study at the Florida  
24 International University. It's a grant. I'm not sure if  
25 it's a federal or state grant, but I'm involved with them in

1 a study with the intoxylizer.

2 Q Do you belong to any professional associations?

3 A Yes.

4 Q Could you tell the jury about them?

5 A I primarily belong to the Society of Automotive  
6 Engineers. Also, the National Association of Accident  
7 Reconstuctionists.

8 Also, the International Association and Management  
9 of Technologists, which basically is an engineering type of  
10 organization. And those are primarily the ones I belong to.

11 Q Have you spoken at any seminars?

12 A Yes.

13 Q As part of your job, do you normally attend  
14 seminars?

15 A I usually attend about two a year. It depends.  
16 Sometimes, two or three. It depends on what my schedule is  
17 and what seminars are offered. I normally teach or lecture  
18 about four to six per year. And again, that depends on what  
19 I am doing.

20 Q Have you spoken at any seminars? I just asked you  
21 that. Sorry.

22 A Right.

23 Q Have you published any articles?

24 A Yes.

25 Q And what is the subject matter of the articles

1 that you published?

2 A Two of the articles covered field sobriety  
3 exercises. Two of them are related to the intoxylizer or  
4 breath testing devises. And I wrote a chapter for vehicular  
5 homicide involving people who are impaired. And I have  
6 written several training outlines for the State of Florida  
7 and for the Broward Police Academy regarding field sobriety  
8 exercises, and also, the intoxylizer. The operational  
9 procedures. Those kinds of things.

10 Q Have you ever testified as an expert witness?

11 A Yes.

12 Q Approximately, how many times?

13 A Well, it's tough to say. But somewhere  
14 approaching 1000 times. I have testified quite a bit over  
15 the last 25 years.

16 Q What fields have you testified as an expert  
17 witness in?

18 A Well, accident reconstruction is my primary field.  
19 I have also testified numerous times on the intoxilyzer or  
20 the breath testing -- the breath testing devises have  
21 changed over the years.

22 When I say "Breath testing," it just covers the  
23 devices. And also, field sobriety exercises at it relates  
24 to either the machine or roadside exercises.

25 Q Have you testified solely for the defense?

1 A No.

2 Q You've also testified for the State?

3 A Yes.

4 Q What would you say the percentage is that you've  
5 testified for the State or the defense?

6 A Well now, I primarily testify for the defense.  
7 Obviously, when I was a deputy with the Sheriff's Office I  
8 testified for the State when I was an employee. But now  
9 primarily, I testify for the defense when I take cases  
10 because the State has their own people. And so I just  
11 primarily testify for the defense. Although I do do some  
12 government work, but not as much as I used to.

13 Q Are you familiar with the Intoxylizer 5000?

14 A Yes.

15 Q Are you familiar with the Intoxylizer 5000-R?

16 A Yes.

17 MR. MALOVE: Judge, at this time, I would offer  
18 Mr. Swope as an expert witness in the areas outlined.  
19 He should be able to give his expert opinion.

20 MS. ZACCOR: Judge, the State would like to voir  
21 dire the witness.

22 THE COURT: Knock yourself out.

23 VOIR DIRE

24 BY MS. ZACCOR:

25 Q Good morning, Mr. Swope?

1           A     Good morning, ma'am.

2           Q     You don't have any degrees in biology, do you?

3           A     No.

4           Q     Do you have any degree in chemistry?

5           A     No. I already stated what my degrees were, ma'am.

6           Q     Okay. Have you ever gone to medical school?

7           A     To be a doctor?

8           Q     Exactly.

9           A     No.

10          Q     Have you ever had any classes related to  
11 pharmacology?

12          A     Classes, yes.

13          Q     Have you ever gotten a degree in pharmacology?

14          A     No, ma'am.

15          Q     Have you ever given any type of pharmacology  
16 seminars?

17          A     I don't know what you mean by that question.

18          Q     Have you ever given a seminar -- you said you've  
19 given some seminars.

20                    Have you ever given a seminar specifically in the  
21 area of pharmacology?

22          A     No. Not specifically, no. As far as results.  
23 But not specifically, no.

24          Q     Do you belong to any type of pharmacology  
25 associations?



1 I know you stated some associations you belong to.  
2 Are any of these pharmacology associations?

3 A No. I don't know if there are any pharmacology  
4 associations.

5 MR. MALOVE: Judge, I object. This is outside the  
6 field of expertise that I offered him as an expert.

7 THE COURT: She is asking. Maybe she wants to  
8 know if he works for Orkin. I don't know. We'll find  
9 out. Overruled.

10 BY MS. ZACCOR:

11 Q Mr. Swope, were you ever an agency inspector for  
12 BSO to be able to maintain the intoxylizer?

13 A You mean -- yes. I did not sign documents. But I  
14 did inspect.

15 Q You were considered an agency inspector by the  
16 Broward Sheriff's Office?

17 A At that time, an agency inspector was not the  
18 terminology. That's FDLE terminology. But I was an  
19 inspector. Well, maintenance operator it was called at that  
20 time. Yes. I oversaw the maintenance of all the machines.  
21 Yes.

22 Q And when you went to inspect the machines, did  
23 you ever sign the documents related to the machines?

24 A No. At that time, it was our procedure not to  
25 have deputies sign the documents. They were all signed by

1 CSA's at that time.

2 Q Okay. Now the intoxylizer was not used for  
3 evidential purposes until 1987, isn't that correct?

4 A No. I believe it was started -- they began using  
5 it for evidential purposes later '85 or early '86. But in  
6 '87, it became the sole machine used in the State of  
7 Florida. I think we had five of them up until that point.

8 Q And were you still with the Broward Sheriff's  
9 Office during that time?

10 A Yes, ma'am.

11 Q And what were you doing? What were your  
12 responsibilities then as far as the intoxylizer during '85,  
13 '86, and then in '87, when the intoxilyzer was finally being  
14 used for evidential purposes?

15 A That's a big question. In '85, we were  
16 experimenting with the machine for HRS. At that time, there  
17 were three sites I believe in the State of Florida. We were  
18 chosen as a site.

19 My responsibility was to test the intoxilyzer,  
20 along with David Fries. We had to make the results of the  
21 tests available to our commanders. In turn, that was made  
22 available to the State. We experimented with it for  
23 probably, I'm estimating, four to five months.

24 And then we had several meetings with HRS. At  
25 that time, the machine was placed into service. We went in

1 separate groups, I believe to Colorado, to take training at  
2 that time by the manufacturer. We had a few questions about  
3 the machine. We had a few problems at that time.

4 CMI came down to assist us with those problems.  
5 We did -- I don't know how many maintenances and tests on  
6 the machine during that time.

7 And then when I think we began using it for breath  
8 testing purposes was either late '85 or early '86. At that  
9 time, we used it as a backup machine.

10 Q Okay. And then in '87 when it started being the  
11 sole use for evidential purposes, is that when you started  
12 your company? In 1985?

13 A Well, the reconstruction company started then. I  
14 did not do any DUI consulting until 1992, I believe.

15 Q Okay. But you were doing the accident  
16 reconstruction?

17 A Sure. Yes, ma'am. That's correct.

18 MS. ZACCOR: The State has nothing further.

19 THE WITNESS: Thank you, ma'am.

20 THE COURT: I'll allow him to testify as an  
21 expert.

22 MS. ZACCOR: Judge, the State will object to him  
23 testifying as expert in field sobriety exercises based  
24 on State versus Meador.

25 THE COURT: What?

1 MS. ZACCOR: Because the State versus Meador says  
2 that officers can only testify to field sobriety  
3 exercises based on their lay opinion and observations.

4 An expert can't come in and testify --

5 THE COURT: He can testify as an expert on the  
6 intoxylizer.

7 MS. ZACCOR: But not on field sobriety exercises.  
8 That was the State's objection.

9 THE COURT: Nobody is an expert on field sobriety  
10 exercises.

11 MR. MALOVE: If I lay the proper predicate --

12 THE COURT: He is not an expert on it. He can  
13 testify about it because he's probably done it about  
14 -- how many times?

15 MR. MALOVE: How many times have you administered  
16 the field sobriety exercises?

17 THE WITNESS: A thousand, I suppose.

18 THE COURT: Understand, within a certain  
19 perimeter, and not the perimeter of him looking at a  
20 video saying how somebody does.

21 MR. MALOVE: I understand. I wouldn't ask that.

22 THE COURT: If he wasn't there.

23 MR. MALOVE: How are they supposed to be  
24 administered?

25 THE COURT: That is a different story, based on

1           how he was trained. But not as an expert. As a former  
2           police officer, or sheriff or both.

3 BY MR. MALOVE:

4           Q     Are you familiar with the Florida Highway Patrol's  
5           standard sobriety testing?

6           A     Yes.

7           Q     These field sobriety exercises, they called them  
8           standardized.

9                     Is that because every department, every officer,  
10           no matter where you are in the country is supposed to do  
11           them in a uniform fashion?

12          A     Yes, sir.

13          Q     Now do you know what the correct technique is to  
14           instruct a subject to do the finger to nose exercise?

15          A     Yes.

16          Q     Could you explain to the members of the jury what  
17           that is? How the field sobriety exercise is supposed to be  
18           performed?

19          A     Well, that would be performed with the individual  
20           standing obviously in an erect position. Their feet would  
21           be together. Their heels and toes would be together. Their  
22           hands initially would be at their side while the officer is  
23           explaining the instructions. Upon the instructions being  
24           explained and the demo being performed, the individuals  
25           again would maintain that position.

1           They would extend their arms totally out at a 45  
2 degree angle of their body. The officer would then call for  
3 either the right or left. The person's head would be tilted  
4 back. Their eyes closed. They would bring their hand  
5 directly to the front. They would turn their wrist. They  
6 would bring their finger back to their nose, and return to  
7 that position. And the officer would do that a minimum of  
8 six times.

9           Q     Are you aware of any standard field sobriety  
10 exercises with respect to the finger to nose where you are  
11 supposed to leave your arm at your side and bring it  
12 straight up to your nose?

13          A     No. Not that I am aware of. No.

14          Q     If you had seen somebody that you instructed or  
15 were teaching how to perform that field sobriety exercise  
16 administer that particular exercise in that fashion, would  
17 that be wrong?

18          A     Yes. I would say so.

19          Q     Are you familiar with the walk and turn?

20          A     Yes.

21          Q     Is that sometimes referred to as "Walk the line?"

22          A     Yes, sir. Or heel to toe.

23          Q     When you instruct people to perform that exercise,  
24 are you supposed to use a line?

25          A     Yes.

1 Q A painted line?

2 A Well, some type of line. Yes.

3 Q And if somebody administered the field sobriety  
4 exercise without a line, would that be correct?

5 A No.

6 Q Now with respect to the one leg stand, would you  
7 ever administer that exercise in the wind?

8 A Well, it depends. If there is a little breeze, a  
9 mile or two an hour would be okay. But if the clothes were  
10 blowing generally, or if it affects the person then you  
11 would not do that.

12 Q I want to talk to you a little bit about the  
13 intoxilyzer. How does it work?

14 A Well, the machine technically works on what is  
15 called "Analog processing." And what that really means is  
16 the signal that the machinery relies on is electric in  
17 nature.

18 A person cannot calibrate the machine. They can  
19 only check the calibration of the machine, unless you are  
20 certified to do that. And really, what the machine does  
21 very simply is it takes a sample of one one's breath through  
22 a heated tube. It goes into a sample chamber.

23 There is a light in the sample chamber. And to  
24 give you a good idea of what the machine does is if you --  
25 it works on the same process as if you are driving at night

1 in your car and have your headlights on.

2 Assume you can see 500 feet with the headlights on  
3 and see clearly. There are no problems. And then you hit a  
4 patch of fog. Obviously, your headlights can't see as far  
5 because the fog is obstructing the light.

6 So if you could measure the distance that your  
7 light goes when the road is clear, and then the distance  
8 your light goes when it's foggy, if you could subtract the  
9 two, it would give you a numerical value based on what is  
10 called lumens, as far as light goes.

11 The intoxilyzer does the same thing. Say like for  
12 room air like we are breathing now it will give a numerical  
13 value, which should be zero because the air should not be  
14 contaminated with alcohol. When someone drinks alcohol and  
15 ingests it into their system and it comes out, the  
16 intoxilyzer measures the difference between the clean air  
17 and the alk air holding ethanal and gives us a numerical  
18 value. And it's processed digitally. And it's analog  
19 processed on the machine.

20 Q Sounds like you have studied this machine quite a  
21 bit?

22 A Yeah. I spent quite a bit of time with it. Yes.

23 Q Does it test a blood sample?

24 A Well, that is a yes and a no, actually. It  
25 doesn't actually take a physical blood sample. In other



1 words, you can't put blood into the machine. But the  
2 reading that it gives you is based on what is in one's  
3 blood.

4 Q Now are you familiar with mouth alcohol testing?

5 A Yes. Yes.

6 Q Are you aware of whether or not there have been  
7 any studies that have been done where there has been a wet  
8 lab?

9 Do you know what a wet lab is?

10 A Yes.

11 Q Where there has been a wet lab, where a person has  
12 been dosed with some alcohol, and also puts alcohol in their  
13 mouth to determine whether or not the instrument or the  
14 machine can pickup mouth alcohol?

15 A Yes. That's correct.

16 Q Do you know if there has ever been any kind of  
17 testing to determine whether or not the machine would pickup  
18 mouth alcohol when a person is always undosed?

19 Do you understand what I am saying? When they do  
20 the maintenance?

21 A Right.

22 Q They do a maintenance for mouth alcohol test?

23 A With stat solutions. Correct.

24 Q But they also do that with an alcohol free  
25 simulator?

1           A     Right.

2           Q     So they don't test some alcohol in the simulator  
3 at the same time they test with mouth alcohol?

4           MS. ZACCOR:   Object to leading.

5           THE COURT:   Let him testify.

6           THE WITNESS:   You want to ask me again?

7 BY MR. MALOVE:

8           Q     Has there been any maintenance test done with an  
9 alcohol solution and mouth alcohol?

10          A     Well, there has been many tests.   The State does  
11 not do that.   The State uses a stat solution, which means  
12 they take pure alcohol and the officer swishes it in their  
13 mouth and generally spits it out and blows directly into the  
14 machine.

15                  That is what is known as a non-field test  
16 condition.   It's basically an improper way of testing the  
17 machine.

18          Q     Why do you say that?

19          A     Well, because at least to my knowledge, no subject  
20 is ever brought in for testing and given a beer and told to  
21 blow into the machine.   People are observed for a period of  
22 20 minutes.   I'm sure the officer testified to that.   And by  
23 the time they are brought in from the road and brought into  
24 the facility and blow into the machine, there's generally a  
25 period of time involved like an hour or something like

1 that.

2 So when the officer tests the machine monthly, he  
3 has solid 100 proof alcohol in his mouth. He spits it out  
4 and blows directly into the machine.

5 The machine will pick that up every time. But  
6 what you want to know is if someone burps or regurgitates or  
7 you have something in their mouth or trapped alcohol. You  
8 want to make sure the machine will pick that up. And that  
9 is what we test for. But the State does not require at this  
10 point to test for that.

11 Q Can that affect a reading? Mouth alcohol?

12 A Sure. If the machine does not pick it up and the  
13 officer somehow misses it or they do have a mouth alcohol  
14 reading, it can affect the ultimate result. Yes.

15 Q Now the instrument has a mouth alcohol detector?

16 A It does. Yes.

17 Q Does the instrument always pickup the mouth  
18 alcohol?

19 A No. It doesn't.

20 Q So in other words, it doesn't always record it?

21 A No. In testing, it does not pickup mouth alcohol  
22 all the time. And of course, we don't know in the field how  
23 often it does or does not pick it up.

24 MR. MALOVE: May I approach the witness, Your  
25 Honor?

1 THE COURT: Yeah.

2 BY MR. MALOVE:

3 Q Showing you now what has been marked as State's  
4 Two, State's Three, State's Four and State's Five.

5 What is that? What are those?

6 A Well, they're Florida Department of Law  
7 Enforcement forms. They are registration for this  
8 particular machine.

9 In this case, and I only use the last four  
10 numbers, which is 2661.

11 And also, it has the reading in this case of your  
12 client. A breath test affidavit. And also, has a breath  
13 inspection report, which lists the machine as being  
14 registered to the State of Florida. Not the Broward  
15 Sheriff's Office.

16 I call it a loaner machine. I guess that's what  
17 they call it.

18 Q If you were to be the person doing the maintenance  
19 on this -- 2661?

20 A Right. 2661.

21 Q Would you have passed this instrument?

22 A Well --

23 MS. ZACCOR: Objection. Speculation.

24 THE COURT: Sustained.

25 BY MR. MALOVE:

1           Q     Do the documents square with your training and  
2 knowledge of what is required for maintenance?

3           A     No.

4           Q     Why not?

5           A     Well, because the machine is not registered, at  
6 least from this form, to the Broward Sheriff's Office. They  
7 have to have their own registration and certificate to put  
8 it in service.

9                     In other words, they get it from Florida  
10 Department of Law Enforcement. So they have to pull the  
11 maintenance on it when they get it. And then when they move  
12 the machine, because it is listed portable, they have to do  
13 a maintenance each time that they move the machine or place  
14 it on the truck or off the truck or from facility to  
15 facility.

16                    And I don't see that, unless I missed it  
17 somewhere.

18           Q     Now how accurate is the intoxylizer?

19           A     Well, the machine is technically accurate as far  
20 as being able to pickup alcohol or ethanal and sometimes  
21 certain interference. It's not reliable, but it's certainly  
22 accurate.

23           Q     What do you mean, it's not reliable?

24           A     Well reliability, at least in scientific terms, is  
25 the ability to come up with the same result all the time.

1           In other words, you are able to repeat the result  
2 over and over and over again. The machine does pickup  
3 alcohol. It is a good alcohol detector. No doubt about  
4 it.

5           But numerically, there are things that can affect  
6 the ultimate reading which could cause the machine to be  
7 either higher or lower. So it doesn't give you an exact  
8 reading.

9           Q     Can you give be a little more specific about what  
10 you mean by it could be higher?

11          A     The machine, as I testified earlier, converts a  
12 sample to a breath reading. And there are certain factors  
13 that are either built into the machine or that occur during  
14 the breath test.

15                One is that the .005 -- I hate to call it an  
16 error, but it's a reliability that is built into the  
17 machine. And the factory specifications indicate that the  
18 machine can only be accurate to plus or minus .005.

19                The State of Florida has adopted that. And has  
20 also added a .005 plus or minus for the maintenance officer.  
21 So it can actually be -- the maintenance can be .005 high or  
22 low of whatever figure the machine is set at calibration -  
23 wise.

24                So actually, rather than having a .005, you have a  
25 .010. But I only use the .005. And you have a second

1 subsequent thing, which is .020.

2 The State of Florida states that you must have two  
3 readings that fall within a .020, as they did in this case.  
4 But because breath testing is a conversion, the reading  
5 could be .020 high, or .020 low. So if you add the two  
6 together, it's .025. So the reading could be higher or  
7 lower by .025. So it falls within that range.

8 Q And if you would subtract .025 from the breath  
9 test in this case, what would the result have been?

10 A Well, if you take the highest breath, which in  
11 this case was a .100, you would come up with a .075. And if  
12 you take the .095, you come up with a .070.

13 And in reverse, you can add on that as well.

14 Q Now are you familiar with partition ratio?

15 A Yes.

16 Q What is that?

17 A Really, it's just what the machine is calibrated  
18 at. Twenty-one hundredths of air equals one cc of blood.  
19 And the machine is set on that blood and breath ratio.  
20 Because proportionally, what is in your blood is in your  
21 breath. It's a proportional relationship between the two.

22 Q Does the partition ratio stay the same?

23 A No.

24 Q It changes?

25 A It can change on individuals. Yes.

1           Q     Does it change -- does it change in the drinking  
2 of a person?

3           A     In drinking persons, it changes. Yes.

4           Q     And based on an average?

5           A     It's on an average. That's correct.

6           Q     Does everybody have their own individual partition  
7 ratio?

8           A     Sure. Depending on when a test would be taken or  
9 how much they drank and what their metabolism is. Yes.

10          Q     Do you know what my client's partition ratio is?

11          A     No. Not without testing her.

12          Q     Can the Intoxylizer 5000 be set at a different  
13 partition ratio other than 2100 to 1?

14          A     It could be. Yes.

15          Q     Do you know what the range is that it could be set  
16 at?

17          A     Well, all I know is the machine could be set  
18 really at any range. All I know is the range that people  
19 fall in. And that would be at 3100 to 1, and 2600 to 1.

20                 And that would be -- you know, that is a small  
21 percentage of the population. But that is where the normal  
22 drinking person can fall.

23          Q     If my client's partition ratio was lower than 2100  
24 to 1, that would also be a reason that you would say her  
25 breath test could have been lower and the instrument