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State of Florida
County of Broward

JUDGE: Ginger Lerner-Wren

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

CASE NO. 98-32574 NM10A

STATE OF FLORIDA.
Plaintiff.
vs.
DARREN CHINNON.
Defendant.

E-X-C-E-R-P-T

COPY

EXCERPT of proceedings had and taken before The Honorable Ginger Lerner-Wren, one of the Judges of said Court, Broward County Courthouse, Fort Lauderdale, on the 22nd day of June, 1999, commencing at or about the hour of 9:00 a.m., and being a jury trial.

APPEARANCES:

EVAN HOFFMAN, ESQUIRE
LOUIS MARTINEZ, ESQUIRE
Assistant State Attorney
Appearing on behalf of the State.

ANDRES QUINTERO, ESQUIRE
Appearing on behalf of the Defendant.

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1 (Thereupon, the following proceedings were had.)

2 MR. QUINTERO: We would call Mr. Swope to the
3 stand.

4 Thereupon.

5 RICK SWOPE,

6 having been first duly sworn, was examined and testified upon
7 his oath as follows:

8 THE CLERK: Please be seated.

9 State your name and spell your last name for the
10 record.

11 THE WITNESS: My name is Rick Swope, S-W-O-P-E.

12 DIRECT EXAMINATION

13 BY MR. QUINTERO:

14 Q. Good morning, Mr. Swope.

15 A. Good morning.

16 Q. Mr. Swope, would you please state your address for the
17 record?

18 A. I live at 8211 Southwest 28th Street in Davie,
19 Florida, 33328.

20 Q. Would you please tell the jury about your
21 qualifications?

22 A. I was a police officer for 15 years. The last six
23 years I was with the Broward Sheriff's Office in Fort
24 Lauderdale. Four of those six years was as administrator with
25 the DUI Task Force and traffic homicide doing fatalities and

1 breath testing. making sure the machines were on line. the
2 video tape was working. those kinds of things.

3 I have a Bachelors Degree in Criminology from Saint
4 Thomas. Bachelors Degree in Technology and Engineering from the
5 University of Miami. Instructor in Highway Safety
6 Administration teaching police officers in training classes.
7 I'm with the society of Automotive Engineers Accident
8 Reconstruction and several accident reconstruction groups
9 around the country.

10 I do testing with the breath testing division. I've
11 been doing breath testing since 1974. I opened my own business
12 in July of 1990. I do testing. I write articles on the breath
13 testing devises. primarily on the Intoxilizer model breath
14 testing devise.

15 I'm doing a study with Florida International
16 University where they received a grant on the scientific
17 testing of breath testing devises. primarily the Intoxilizer.
18 My job is to make sure it meets the requirements of scientific
19 reliability. publish articles on things that are being done
20 with that machine. I also maintain machines for private law
21 firms and private industry.

22 Q. Thank you. Could you tell the ladies and gentlemen
23 of the jury about maintenance on the machine in question and
24 how that compares with the controlled testing?

25 MR. HOFFMAN: Objection. If he's going to tender the

1 witness as an expert I would like the chance to voir dire him.

2 THE COURT: Are you?

3 MR. QUINTERO: Yes.

4 THE COURT: Okay. Proceed.

5 VOIR DJRE EXAMINATION

6 BY MR. HOFFMAN:

7 Q. Mr. Swope, you were a breath technician for BSO?

8 A. I have a breath permit, yes.

9 Q. Did you ever do maintenance on the Intoxilizer?

10 A. Yes, lots of times.

11 Q. Did you ever sign off -- are you familiar with this
12 document?

13 A. That's from the State of Florida annual inspection.

14 Q. Did you ever sign off on the annual inspection?

15 A. No one did at the Sheriff's Office. It was the
16 regional inspectors.

17 Q. Did you sign off on the monthly inspections?

18 A. No. I had people to do that.

19 Q. So you were certified to maintain the Intoxilizer?

20 A. Yes, absolutely.

21 Q. And you never signed the monthly reports?

22 A. No. We had people to do that. They let the community
23 service aides sign the documents so we would not be in court
24 pretty much around the clock. The CSA's signed those
25 documents.

1 Q. Isn't it true that Deputy Miller and Deputy Fries were
2 the people that did it while you were there?

3 A. No. Deputy Fries was on duty from 1988. Deputy
4 Miller didn't start until '91 or '92. It was CSA Hunt and who
5 the other one was. I'm not sure. in '85. '86. '87. something
6 like that. And those were signed periodically by the CSA that
7 did that.

8 Q. So at no time were you the alleged maintenance person?

9 A. Excuse me? What do you mean alleged maintenance
10 person.

11 Q. You're saying the maintenance person.

12 A. I had a permit.

13 Q. And your never signed. the CSA's did that?

14 A. I explained what the policy and procedures were at the
15 time. This changed at a later time when the State Attorney
16 requested that the deputy perform those functions and sign off
17 because they wanted the deputy in court to testify. not the
18 CSA. that's why.

19 Q. At any time were you the maintenance person that
20 signed off on the monthly?

21 A. Yes. We signed off on the community service aide that
22 signed off the monthly.

23 Q. Wasn't it typical for the maintenance person to sign
24 the monthly while you were there?

25 A. It was not the deputies responsibility at that time to

1 sign off on the documents. We had the community service aides
2 that did that.

3 Q. So your answer was no, it was not a typical practice
4 for them to do that.

5 A. At that time, that's correct.

6 Q. And the device that you were doing maintenance on,
7 were they registered with the FDLE?

8 A. No. At that time, no.

9 Q. The ones now?

10 A. We didn't use their criminal procedure.

11 Q. Were you registered with FDLE?

12 A. No. We had specific reasons why we didn't register
13 with FDLE.

14 Q. Do you have a permit for using them?

15 A. People who do criminal investigations have permits.

16 MR. HOFFMAN: I have no objection -- I have an
17 objection that he's never signed off on one monthly while he
18 was doing this alleged maintenance. Furthermore, the
19 maintenance that he is doing on the Intoxilizer is kind of like
20 someone playing with the machines. It's not under any
21 registration. The Intoxilizer is under Florida guidelines with
22 FDLE.

23 THE COURT: Your objection is noted. He can
24 proceed.

25 MR. QUINTERO: Thank you.

1 BY MR. HOFFMAN:

2 Q. Mr. Swope, would you please explain to the ladies and
3 gentlemen of the jury the difference between maintenance and
4 controlled testing, please?

5 A. Basically, there are two kinds of maintenance, one is
6 under the rules of the State of Florida, which the officer did
7 in this case. Maintenance is done once each calendar month and
8 the officers run the test to basically check the calibration of
9 the machine and check the diagnostic performance internally or
10 externally.

11 MR. QUINTERO: I was looking for some documents.

12 THE COURT: I want to make sure someone has them.

13 BY MR. HOFFMAN:

14 Q. Mr. Swope, explain to the jury the accuracy and
15 reliability of testing.

16 A. Well, the accuracy, basically, that's a scientific
17 term. The accuracy in testing is the ability to get either a
18 known or suspected result. In other words, what the
19 Intoxilizer does, basically, is several functions, but it does
20 test for alcohol, because it reads out a numerical reading of
21 the alcohol.

22 The machine does what it's suppose to do. It
23 identifies the alcohol to be a substance in the person's
24 breath. The other function is giving a numerical value based
25 on what goes into the machine and system on the Intoxilizer.

1 In other words, a numerical number such as a computer screen
2 shows the letter A. the Intoxilizer does basically the same
3 thing.

4 Reliability, the ultimate test of reliability is
5 called a scientific approach, you're looking for an ability to
6 repeat the test over and over and come out with the same
7 result. The Intoxilizer is accurate to pickup the alcohol.
8 It does identify the alcohol, gives the numerical value. What
9 it cannot do is repeat the same test over and over again. It
10 gives a different numerical value based on the amount of
11 breath it puts in, the pressure it puts in. So it's not able
12 to give a reliable reading. I'll explain more on that later.

13 Q. Please explain to the jury how the reliability plays
14 with the breath alcohol sample, if you will.

15 A. Well, do you have a chart?

16 Q. Yes, I do.

17 MR. QUINTERO: May I, Judge?

18 THE COURT: Yes.

19 Just move it so I can see as well.

20 Thank you. I want to make sure everyone can see.

21 THE WITNESS: This, basically, is just a L-chart of the
22 Intoxilizer to show basically how it reads or how the
23 information is spotted. In .080 the Intoxilizer reads to the
24 third digit, which is the thousand, because that's the State
25 standard that's used as a borderline. That test is allowed

1 minus .005 on the solutions and this is the test that they
2 run.

3 In other words, the closer you are to the line, if a
4 little bit above or right on it, the more chances you have for
5 error. Because if you start out with an error at .080, every
6 step you go down you compound the error. Every time you work
7 this arithmetic, if you read .200, if you make an error
8 anywhere in this round ballpark area, the error you made
9 doesn't matter, but it does matter at .08. It allows two
10 separate things, it allows .005 on the solution, but the
11 solution they use is only to the second digit and you can see
12 that the machine reads to the third digit. So when they run
13 monthly maintenance -- let me have this exhibit.

14 In other words, using State's Exhibit Number 4, the
15 monthly maintenance that they ran, the monthly 0.08, we don't
16 know what the third digit is. It only runs to the second.

17 Although it goes to the third, using their own number
18 they came up with .077, .078 and .080. It runs the one
19 thousand, the two thousand or right on. So, in other words,
20 the third digit is off when they perform the maintenance,
21 which it was.

22 Now, the next question is that .005 plus or minus,
23 the machine could be out of compliance and you would not know
24 during the monthly period. So when you have the reading that
25 close, and I think it read in this case .085 and .087, so we

1 really don't know if the third digit would be higher or lower.
2 But the chance of error is only to the thousands, so there is
3 no way of knowing if the reading is valid or not.

4 BY MR. QUINTERO:

5 Q. Thank you. Let me ask you one other question with
6 respect to this question. .085 or .087, does this indicate any
7 increase in the alcohol breath?

8 A. No. In other words, the .087 could be a longer
9 breath or deeper breath. There's no way of saying or no way of
10 knowing. Again, you're making an assumption that these two
11 readings are correct. They may not be. This could be off
12 several thousand. They could be off more than that.

13 If they're off, you're talking about just reading
14 the .087, which is the highest reading, and subtracting .005.
15 That would leave you .082, which is two thousand of a percent
16 above this line, which I couldn't tell you how minute. When
17 you have sugar, one teaspoon level, about two or three of those
18 sugar granules is how close it is. That would be the
19 difference.

20 Q. Now, do you perform maintenance on your own machines?

21 A. Yes. We perform a different kind of maintenance, but
22 yes, we do.

23 Q. Before I get to that, let me show you some of the
24 calculations that were previously done with respect to the
25 alcohol content. And I would ask you to examine this

1 valuation and perhaps assist the Court and jury in determining
 2 how these numbers came to be and do you agree with the
 3 testimony that was presented as to the amount of blood alcohol
 4 level, which was -- I'm showing a breath alcohol level .085.
 5 apparently using the defendant's weight, using the fact that
 6 he's a male. Are you familiar with this?

7 A. Yes.

8 Q. Could you please examine that and give us your
 9 opinion as to whether you agree or disagree with the
 10 calculation?

11 MR. HOFFMAN: I'm going to object. He is not an
 12 expert extrapolation or the maintenance. He's just a
 13 maintenance person.

14 THE COURT: I think counsel's intent was to cover
 15 this area generally.

16 MR. QUINTERO: Yes. Judge.

17 THE WITNESS: Well, that's the Windmark formula.
 18 obviously. The information I see is that the weight is 130
 19 and there is an .085 reading. And I don't see what the
 20 assumption of the alcohol -- did she use 90 proof?

21 BY MR. QUINTERO:

22 Q. I think there is 200 proof down here and 90 proof
 23 down here.

24 THE COURT: Counsel, he's not clear. I don't want
 25 you guessing what was previously testified to.

1 MR. QUINTERO: I understand that.

2 THE COURT: I don't want you testifying.

3 If he's not clear. I don't want him answering to what
4 he's looking at. You can give a new hypothetical.

5 MR. QUINTERO: Yes. Thank you.

6 THE WITNESS: It's 90 proof alcohol.

7 BY MR. QUINTERO:

8 Q. I would like you to examine, and before I ask you,
9 make sure you understand what I'm asking you to do and you
10 understand the example.

11 A. Sure.

12 Q. Are you sure?

13 A. Yes. I figured out mathematically what that comes out
14 to be.

15 Q. Do you agree with that?

16 A. Well, first, I don't agree with 90 proof alcohol.
17 Basically, there is no 90 proof alcohol to use. It's either,
18 generally, 80 proof alcohol. That 90 proof is a little
19 higher. The wine up there, wine is not 90 proof, it is not 200
20 proof. So that would give you a higher reading and the .085
21 reading is correct on the card. You're assuming that as the
22 sum, which I'm not assuming that. So whatever the numbers are
23 you're using, they're just numbers. I would give a range from
24 high to low. It doesn't mean anything.

25 Q. Let's get back to the maintenance. A moment ago you

1 testified that you use and maintain breathilizer machines?

2 A. Yes. quite often.

3 Q. What maintenance procedures do you use?

4 A. Well. the maintenance procedures that I use or that
5 the people who work with me use are called scientific
6 maintenance procedures and we have to make sure that the
7 machine meets the test of reliability.

8 MR. HOFFMAN: I object. relevance.

9 THE COURT: Sustained.

10 BY MR. QUINTERO:

11 Q. Are you familiar with the readings in this case?

12 A. Yes. I am.

13 Q. What errors. if any. have you found in the readings?

14 THE COURT: Can you just repeat that? I'm not clear
15 about what readings you're referring to.

16 BY MR. QUINTERO:

17 Q. The breathilizer readings.

18 A. I don't particularly know what you mean by errors in
19 the readings. I gave you the range.

20 Q. Any discrepancies as to the highs and lows?

21 A. Well. again. I talked about the .08 being a primary
22 target. There is no way of knowing how much above or below
23 that .08 it's so minute. It's within the thousandths of a
24 percent. I have no way of knowing.

25 Q. A couple of final questions. Are you familiar with

1 the State's maintenance procedures?

2 A. Yes.

3 Q. Would you use the State's maintenance procedures on
4 your machines?

5 MR. HOFFMAN: Objection. relevance.

6 THE COURT: Sustained.

7 BY MR. QUINTERO:

8 Q. Do you have an opinion as to the maintenance
9 procedures used by the State?

10 A. Yes.

11 Q. Can you give me the opinion, please?

12 A. My opinion is it is inadequate. The .08 is inadequate
13 if you're off by two, that's 30, 40 percent on the borderline.
14 Those readings would not hold up under any scientific test.

15 THE COURT: You may proceed with the cross.

16 CROSS EXAMINATION

17 BY MR. HOFFMAN:

18 Q. Is it Doctor Swope or Mr. Swope?

19 A. Mr. Swope.

20 Q. Now, during my voir dire on expert qualification, you
21 testified that you were a BSO officer?

22 A. Yes.

23 Q. And you did maintenance?

24 A. I did maintenance and oversaw it, correct.

25 Q. Can I see that document?

1 A. That's mine.

2 Q. And you testified that was under FDLE rules?

3 A. Both under HRS and FDLE rules.

4 Q. And FDLE rules were put in place because they are more
5 stringent?

6 A. No. Just another agency took it over. They aren't
7 more stringent.

8 Q. Nothing different about the maintenance procedure?

9 A. Sure. It changed all the time, every year.

10 Q. When were the FDLE rules put into effect?

11 A. I'm thinking maybe in '87 or '88. I'm not sure when
12 they came into effect.

13 Q. And after my examination, you were asked to look at
14 the jury and tell them if the machine that tested the defendant
15 was accurate and reliable under FDLE rules. Does this
16 maintenance document tell the truth?

17 A. I'm looking at this maintenance document and it meets
18 State standards.

19 Q. That's using the FDLE rules?

20 A. Yes.

21 Q. When is the first time you met the defendant?

22 A. I never met the defendant.

23 Q. Do you know the defendant's name?

24 A. I know his name. Mr. Chinnon.

25 Q. Did you look at this document?

1 A. I did that first.

2 Q. Do you have any written reports that I can see?

3 A. No. I also reviewed the video the tape as well.

4 Q. Do you agree that alcohol affects people differently?

5 A. Sure.

6 Q. As a trained and experienced law enforcement person
7 you saw the different stages of impairment?

8 A. Yes. I would say that.

9 Q. Would you say that as someone with your training and
10 experience in the detection of impairment, you could spot
11 impairment of the average Joe?

12 A. In some cases.

13 Q. Do you know Deputy Hanstein (phonetic)?

14 A. I know who he is, yes.

15 Q. And you testified that you do maintenance on the
16 Intoxilizer for some defense firms?

17 A. I that I had on two owned by law offices and some for
18 Florida International University.

19 Q. For what law offices, Mr. Swope?

20 A. Richard Essen's law office and the other one for Jim
21 Best and Chris -- I forget his -- Parker.

22 Q. Is Richard Essen's law firm the same as Essen and
23 Essen?

24 A. Yes.

25 Q. And they primarily do DUI cases?

1 A. I don't know. You would have to ask them what they
2 primarily do.

3 Q. How many times have you testified for Essen and Essen?

4 A. I don't know. I have testified for them several times
5 over the past ten years and I have testified against them as
6 well.

7 Q. Basically, you are known as what is called a defense
8 expert in DUT cases.

9 A. What do you mean basically?

10 Q. You're listed as a defense witness.

11 A. I'm listed as a defense witness on some cases. yes.

12 Q. When you worked for BSO and testified when a machine
13 was and was not working properly, what was your salary?

14 A. I have no idea. I was probably making overtime.
15 Maybe fifty, sixty thousand a year. I'm not sure if that was
16 in 1990. 1989 was my last full year.

17 Q. And now that you're working on your own at Swope
18 Reconstruction -- is that right?

19 A. That's right.

20 Q. How much do you gross a year?

21 MR. QUINTERO: Objection, Your Honor, relevance.

22 MR. HOFFMAN: Proper impeachment for an expert.

23 THE COURT: Overruled.

24 THE WITNESS: My firm probably makes five and six
25 hundred thousand dollars. Most of that is in the

1 reconstruction business.

2 BY MR. HOFFMAN:

3 Q. Let's talk about this controlled testing. Correct me
4 if I'm wrong. isn't a controlled test the same thing that's
5 done in the monthly and yearly inspection?

6 A. No.

7 Q. It's not?

8 A. No.

9 Q. What's different?

10 A. That's not what I'm being asked exactly. They are
11 two different controlled tests.

12 Q. One controlled test is done yearly and the second
13 monthly.

14 A. Right. They're two different types of controlled
15 tests. I don't want to confuse the jury.

16 Q. Why don't we talk about the one done yearly?

17 A. Okay.

18 Q. What's wrong with that under the FDLE rules?

19 A. The rule cards and the rules have to be attached.

20 Q. The print card, is that what you're talking about?

21 A. Yes.

22 Q. Under the FDLE rules --

23 A. This isn't it.

24 Q. You said the print card.

25 A. No. The print card that goes to the maintenance

1 records have to be attached.

2 Q. Just the maintenance documents that we're talking
3 about here.

4 A. Yes.

5 Q. Just go by those. what's in evidence. sir?

6 A. That's not the question. You asked me if they were
7 accurate and I have to see the print cards to see if they
8 match how the State requires they be kept.

9 Q. Just humor me. That's what's in evidence.

10 MR. QUINTERO:. Objection. Asked and answered.

11 THE COURT: Sustained.

12 BY MR. HOFFMAN:

13 Q. You're telling me you can't go by those and tell
14 whether this machine was working properly under FDLE rules.

15 A. Right. The print cards are required under the rules
16 to be attached.

17 Q. When Franca Dicienzo testified before, are you saying
18 her testimony should be discredited because the print cards
19 weren't attached?

20 A. I don't comment on testimony. You asked me a
21 question, if I could tell by these documents. I said no.

22 Q. Can you go by the readings?

23 A. No. These readings are handwritten.

24 Q. Have you ever given expert testimony based solely on
25 whether a machine was working properly or not?

1 A. I don't know what you mean.

2 Q. Without the print cards attached.

3 A. I'm answering the question in a general way to say
4 this is correct.

5 Q. Let's do that. Those are correct.

6 A. Right.

7 Q. What's wrong with them?

8 A. If these readings are correct, there is nothing wrong
9 with them on this form.

10 Q. What's the legal limit in Florida?

11 A. .080.

12 Q. What does the print card say the defendant was?

13 A. .085. .087.

14 MR. HOFFMAN: No further questions.

15 THE COURT: Anything else

16 MR. QUINTERO: Yes. I have a couple.

17 THE COURT: Can I get the documentation back so it's
18 not misplaced?

19 Thank you, sir.

20 REDIRECT EXAMINATION

21 BY MR. QUINTERO:

22 Q. With respect to the documents that counsel has just
23 asked you about, the readings you said that you needed print
24 cards.

25 A. Right.

1 Q. And you testified if you are sure that those numbers
2 are accurate.

3 A. No.

4 Q. Just from looking at that document.

5 A. No.

6 Q. Now, counsel asked you about prior law enforcement
7 training that you had and your knowledge of impairment.

8 A. Yes.

9 Q. What are the signs for reliability for field sobriety
10 testing?

11 MR. HOFFMAN: Objection.

12 THE COURT: Sustained.

13 MR. QUINTERO: That was brought up previously.

14 THE COURT: We need a side bar.

15 (Thereupon, the following proceedings were had at side
16 bar outside the hearing of the jury panel.)

17 MR. QUINTERO: I was very careful not to open the
18 door. He was asked about his impairment experience as a
19 police officer. How would he be affected by alcohol.

20 MR. HOFFMAN: Nothing about sobriety tests.

21 THE COURT: Let him finish.

22 MR. QUINTERO: He opened the door.

23 THE COURT: I don't find that the door has been
24 opened. My ruling stands.

25 (Thereupon, the following proceedings were had in the

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presence of the jury panel.)

BY MR. QUINTERO:

Q. Final question. With to any degree of certainty, can you testify that what the State has provided in this case is in fact accurate and reliable?

A. No. I cannot.

MR. QUINTERO: Thank you.

THE COURT: Sir.

MR. HOFFMAN: I have nothing further.

THE COURT: You're excused. sir.

THE WITNESS: Thank you.

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STATE OF FLORIDA
COUNTY OF BROWARD

I, DEBRA HILL, certify that I was authorized to and did
stenographically report the foregoing proceedings and that the
transcript is a true record.

Dated this *12th* day of *July* 1999.

Debra Hill
DEBRA HILL



"OFFICIAL SEAL"
Debra Lee Hill
My Commission Expires 8/14/99
Commission #CC 482366