

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

GLENDALEE CLAY
APPELLANT

APPEAL NO.: 99-6485-CA-01

CASE NO.: 95-6506-T

VS-

STATE OF FLORIDA
APPELLEE

**VOLUME 6 OF 7
CRIMINAL APPEAL**

APPEALED FROM THE COUNTY COURT IN AND FOR SARASOTA COUNTY,
FLORIDA, THE HONORABLE BARBARA BRIGGS , PRESIDING JUDGE.

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**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA APPEAL DIVISION**

GLENDALEE CLAY

CIRCUIT COURT CASE NO 95-6485-CA

Appellant,

vs.

STATE OF FLORIDA

COUNTY COURT CASE NO. 95-65-6T

Appellee

TRANSCRIPT OF
TRIAL TESTIMONY

2/16/99 and 3199

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TRIAL TRANSCRIPT 2/26/99 and 3/3/99

JUDGE BRIGGS

Kerry E. Mack, Esquire, (hereinafter “Defendant’s Attorney”, good morning, Judge. Your Honor, we have filed a Motion to Suppress and, I hope... my file says a copy was faxed to the Court some time ago so I’m hoping you have (inaudible) and, I believe that the text of the case that I am going to rely upon was faxed to you together with the statutes dealing with the use of multiple beam headlights. So, I’m hoping that you have all that. If you don’t, then I will be happy to supply it to you. This is a Motion to Suppress under 3190H&I. We believe it involves constitutional issues and unless the State has some problem with the sufficiency of the Motion which I haven’t heard since February 17th, we believe that the Case Law establishes that it is their duty to go forward..

Mr. Flaherty (hereinafter “Prosecutor”) Your Honor, the State would prefer to deal with the Motion to Strike this as being unkindly. As you know the jury has been sworn on this case and it will put the State at a great prejudice if this Motion was heard and granted after the jury was sworn. Defendant’s Attorney. Well that’s not true Judge because the State has the right to appeal a Motion and they can ask for a Stay and they have that relief so I don’t think it is prejudicial to them, Your Honor. This Crooks case did not come to my attention until after...in fact I only received it and became aware of it about two weeks ago. I was in Charlotte County and it probably wasn’t even two weeks ago. I think it was actually the day that this Motion was filed. I had been in Charlotte County and one of the lawyers down there had filed a Motion on a very similar type situation as the facts that

1 exist in this case and so we filed this immediately. You know, the Rule says "when the situation arises,
2 if there isn't another case that precedes Crooks on this issue." So, you can't make a Motion based on
3 something that has not yet been established in the law unless you want to try to pioneer something
4 which usually is unsuccessful so, you know, we feel that the Court should hear this. If the Court
5 determines that it is prejudicial to the State, then I think that the alternative is for the Court to
6 determine this to be a Motion in limine and you should hear it anyway. It is a legitimate pretrial issue
7 We call Nick.

8 Judge Briggs (hereinafter "Judge") We have the Motion in limine.

9 Defendant's Attorney. Yes, and we'll call on Nick, we're ready to proceed.

10 Officer Nick requested to face the Judge, raise right hand.

11 Judge. (Inaudible) the evidence you give to be the truth, the whole truth and nothing but the truth.

12 Officer Nick (hereinafter "Nick")

13 Defendant's Attorney.

14 Q. Will you tell us your full name, please?

15 A. Officer Aaron R. Nick.

16 Q. Were you employed with the North Port Police Department on or about November 11, 1995.

17 A. Yes ma'am, I was.

18 Q. And was your job a police officer with that department?

19 A. Yes it was.

20 Q. Were you on duty approximately...well, after midnight but before 6:00 a.m. in the morning?

21 A. Yes I was.

1 Q And were you in a marked patrol car with your uniform, etc. and badge and so forth?

2 A Yes.

3 Q And, where were you traveling?

4 A Where was I traveling?

5 Q Where were you patrolling?

6 A The city of North Port. Primarily the business district.

7 Q And where is that? What's the business district?

8 A It's a three mile stretch of business on U.S. 41.

9 Q Is 41 also called State Road 45?

10 A Yes it is.

11 Q Alright. The City of North Port city limits go from where to where on U.S. 41 if you know.

12 If you don't know, just tell us ou don't know.

13 A On 41. It goes South from..right in the area which would be south of Warm Mineral Springs

14 into an area of Grenada and Groomstree south to the Charlotte County Line.

15 Q Where does North Port Boulevard intersect with U.S. 41? In other words, in the area that you

16 just described, where would we find North Port Boulevard intersection with U.S. 41?

17 A You would find it, as far as metered traffic intersections or as far as miles or....

18 Q Is it on the northern end or the southern end of North Port?

19 A It runs both directions, north and south, across 41.

20 Q Alright. Well, is it closer to the northern border of the City of North Port or closer to the

21 southern border of the City of North Port?

22 A The majority of North Port Boulevard runs through the southern portion.

- 1 Q. Alright. Now, at approximately 4:30 in the morning, where were you traveling?
- 2 A. I believe I was on North Port Boulevard.
- 3 Q. And which way were you going?
- 4 A. To turn southbound onto State Road 45.
- 5 Q. Alright. And, did you see a, I think its a...I'm going to call it a Jeep but it may not properly be
- 6 a Jeep. Is it a Jeep, Glendalee?
- 7 A. Glendalee (herein after "Defendant." Yes.
- 8 Q. Did you see a Jeep that night?
- 9 A. Yes I did.
- 10 Q. What color was it?
- 11 A. Dark .. I believe it was black.
- 12 Q. Do you remember the events this evening from 1995?
- 13 A. Mostly
- 14 Q. Okay, fair enough. If you need to look at any of your paperwork Officer Nick, I don't have a
- 15 problem with your doing that if you just let us know for the record that you're refreshing your
- 16 memory from a document so it will be clear. Okay?
- 17 A. Understood.
- 18 Defendant's Attorney: Thank you. Alright.
- 19 Q. Where was the Jeep when you first saw it?
- 20 A. South on North Port Boulevard.
- 21 Q. It was heading southbound on State Road 45?
- 22 A. Yes.

1 Q. Alright. And, where were you precisely as far as best you can recall when you first saw the
2 Jeep?

3 A. Approaching or at the intersection of North Boulevard and (inaudible).

4 Q. Alright. So, is there a traffic light at that intersection, sir?

5 A. Yes there is.

6 Q. Alright. Who had the green light and the choices are between you and Ms. Clay. You recall
7 Ms. Clay, I take it?

8 A. Yes I do.

9 Attorney for Defendant. Alright. Fair enough.

10 Q. Who had the green light, do you recall.

11 A. She did. She had the right of way.

12 Q. Alright. So she was heading southbound and there is a grassy median separating 41
13 southbound from 41 northbound in that area?

14 A. That's correct.

15 Q. Can you recall what lane of travel Ms. Clay was in when you first saw her passing that
16 intersection?

17 A. I believe it was the outside lane. The lane closest to the shoulder.

18 Q. Would that be closest to...when you say 'to the shoulder' I'm sorry, does that mean to the
19 median or to the right-hand side of the road?

20 A. Right-hand side..the shoulder.

21 Q. Alright. And so, you were stopped at the red light, I'm taking it. Is that correct?

22 A. Yes.

1 Q. And, she is going through the intersection southbound.

2 A. Yes.

3 Q. Okay. And, was there...it's 4:30 in the morning, approximately. I think your Probable Cause
4 Affidavit says it was 4:33 so I'm just going to say around 4:30. Okay?

5 A. Yes.

6 Q. How much other traffic was there in that area at that time?

7 A. Very light.

8 Q. What does very light mean. Other than you and Ms. Clay, were there any other cars on the
9 road that you can recall?

10 A. Nothing that I know. I can tell you that probably about that time traffic is light, what traffic I
11 do see.

12 Q. Alright. Do you have specific recollection of there being any cars on the road in that general
13 area of 41 and North Port Boulevard at the time that you first saw Ms. Clay's vehicle?

14 A. No.

15 Q. Okay. Now, were you simply on routine patrol or was there something about Ms. Clay's
16 vehicle that caused you to look at it other than there is no other car on the road?

17 A. I had to look at it to make a right-hand turn to the south and said vehicle had the right of way.

18 Defendant's Attorney. Okay.

19 A. Beyond that, the next thing that I noticed was the extremely bright front headlights.

20 Q. Okay. This was very early in the morning, is that right?. It was very dark outside?

21 A. That's correct.

1 Q. Alright. And, so you had to wait for the car to pass you to make your right on red so you could
2 go southbound.

3 A. That's correct.

4 Q. Alright. And, so did you then proceed on your lane of travel or was it your intention to follow
5 Ms. Clay?

6 A. I just went right, the direction I was originally going to go.

7 Q. Alright. So, there was no reason...That was where you were headed so you just make your turn
8 and continued on. Is that correct or not?

9 A. Yes.

10 Q. Okay. And, for how far a distance to Ms. Clay travel down U.S. 41 before you began following
11 her for purposes other than you all just happened to be going in the same direction? Do you
12 understand my question?

13 A. I believe so.

14 Defendant's Attorney. Okay.

15 A. I'd say approximately half a mile.

16 Q. Okay. And what intersection then, if there is one, would you have been approaching at that
17 time? If you can give us a kind of geographical marker?

18 A. It is the intersection, as I recall, Tuscola Boulevard, which is an unpatrolled interesction.

19 Q. No traffic light?

20 A. That is correct.

21 Q. Alright. So, Ms. Clay had the through right of way so she could just keep continuing on?

22 A. That's correct.

1 Q. So, was there anything unusual happening at this time?

2 A. After I turned (inaudible)?

3 Q. Yes. You've got us now.. you turned right from North Port Boulevard, you are now behind

4 Ms. Clay southbound on U.S. 41 approaching Tuscola Boulevard. Okay. So what happened?

5 What did you see?

6 A. I noticed the Jeep crossing the center lane divider on the maker.

7 Q. Okay. Now, when you say it crossed over the center lane marker, could you tell us how many

8 lanes there are now southbound in this area that you and Ms. Clay are traveling?

9 A. Two southbound lanes.

10 Q. So there would be a solid line or a broken line dividing those two lanes of travel.?

11 A. It's broken, passing lane.

12 Q. Alright. And when she went into the left lane, how far over did her vehicle enter that left lane?

13 A. I'm not sure if it was the left or the right she was going in. It was a very small distance. Not

14 quite the width of the entire tire.

15 Q. Okay. And, did she come back into the right hand lane or did she then go into the left hand lane

16 of travel? Well, let me ask you this, did she continue this.....

17 Judge: Just a second. Are you all witnesses?

18 Attorney for Defendant. They're just support. They are not witnesses, Your Honor.

19 Judge: Okay.

20 Attorney for Defendant: Moral support. I'm sorry. Do you want to repeat my question? I probably

21 forgot it myself but I'm going to try..

22 A. Please.

1 Q. Did she continue on southbound at U.S. 41, in right hand lane at that point or did she then
2 move into another lane of travel? You've got us where she's traveling down Surf...she is going
3 a little bit over...I'm characterizing your testimony, you don't have to agree with me. She's
4 moved a little bit into the left hand lane or gone on that marker. I want to know what did she
5 do next. Did she move all the way into the left lane or did she come back into the right lane?
6 A. I believe she went again over towards the side of the lane maker but this would be the outside
7 of the lane marker...solid lane marker.
8 Q. And that would be the right hand lane?
9 A. Yes.
10 Q. In the solid lane marker, that would delineate the end of 41 and basically what we commonly
11 call the shoulder?
12 A. Correct.
13 Q. And this line on the right hand side, sir, did she cross that line? Is that your testimony?
14 A. No.
15 Q. She just went towards that direction. Is that it?
16 A. On to it.
17 Q. Okay. What did you see next, if anything? You're continuing on again.
18 A. The vehicle returned back to the proper travel lane. Then, at some point, changed lanes to
19 turn toward the northbound direction on Sumpter from State Road 45.
20 Q. And Sumpter, is that a traffic light at Sumpter?
21 A. Yes.
22 Q. That's a pretty big intersection in North Port?

1 A. Yes it is.

2 Q. And is there a left hand turn lane to enter into to make a left?

3 A. Yes there is.

4 Q. Alright. And did Ms. Clay make that lane change and left hand turn appropriately or not?

5 A. Yes.

6 Q. So she put on a turn signal?

7 A. I don't recall. I believe so but there was nothing out of the ordinary about the turn.

8 Q. Alright. Now, was there any on-coming traffic do you recall?

9 A. No I don't recall.

10 Q. Now, had you....Were you now following Ms. Clay?

11 A. Yes

12 Q. So, whatever she was doing, you were right behind her. Is that a fair characterization or not?

13 A. I was in the direct lane behind her going south.

14 Q. Your intention was to follow her, how about that?

15 A. Yes.

16 Q. Okay. What were you following her for at this point.

17 A. Two reasons. One was, I believe, that she was driving with her high beam lights on. Second

18 was two weaving motions that I saw.

19 Q. Okay, alright. And, now, you had the approximate distance between North Port Boulevard and

20 the intersection of U.S. 41 to the intersection of Sumpter and U.S. 41. Give us, if you can

21 please, an approximation of that distance.

22 A. About one mile.

- 1 Q. Alright. Now, Ms. Clay then turned left onto Sumpter, is that right?
- 2 A. That's correct.
- 3 Q. And was it your intention to stop her at that point?
- 4 A. No.
- 5 Q. Alright. Did she continue onto Sumpter Boulevard?
- 6 A. Yes.
- 7 Q. Is it a boulevard? I just picked up the boulevard.
- 8 A. Yes it is.
- 9 A. Alright. And how far did she travel on Sumpter Boulevard?
- 10 A. Maybe two tenths of a mile. A very short distance.
- 11 Q. Okay. And, what caused her to stop?
- 12 A. I stopped her.
- 13 Q. And what happened that caused you to stop her?
- 14 A. A on-coming vehicle flashed its high beam lights at her.
- 15 Q. Alright. And, where did that occur in relation to the area we are talking about? Just as she
- 16 made her left hand turn - the two tenths of a mile - where in that distance?
- 17 A. Approximately two tenths of a mile from the turn from 45 onto Sumpter.
- 18 Q. Let's see if I got this right. She made her left hand turn onto Sumpter. She had her bright
- 19 lights on at that time. There was a car coming at the opposite direction from her. Sumpter is
- 20 two lanes. One going one way and one going the other. And, a car flashed its lights at her and
- 21 you immediately pulled her over. Is that what happened or not?
- 22 A. A short time after, yes.

1 Q. And what were you pulling her over for?

2 A. Failure to dim high beam lights.

3 Q. Alright, okay. I don't have any other testimony to illicit for the purposes of this Motion, Your
4 Honor.

5 Judge: Mr. Flaherty?

6 Prosecutor: No questions Your Honor.

7 Judge: Okay. You can step down.

8 Defendant's Attorney:

9 Your Honor, essentially there is probably a fair long line of cases about pretext stops and
10 Crooks is essentially a pretext stop case but very specific as to the pretext. And, I'll be frank
11 with you, Crooks doesn't use that language but if you read it I think that's a fair representation
12 of what it means. In Crooks, the deputy sheriff and a... I think there were two people involved
13 in Crooks. They had a deputy sheriff and a trooper. And I don't know. Maybe I'm reading
14 a little bit too much into this case but it looks to me like they had a little tag team situation
15 going and one would come up behind Mr. Crooks. The other would go to his left and attempt
16 to create a traffic infraction by their actions. I'm not suggesting that that is what Officer Nick
17 did but I think that the weaving, supposedly that was described is essentially the same type of
18 weaving that you find in Crooks. I think, in fact, it is exactly the same type of weaving that you
19 find in Crooks. Now, with regard to the headlight situation. There is nothing that
20 suggests...there's nothing in the Statute 316238 that suggests that driving in the right hand lane
21 of a major highway at 4:30 in the morning when its dark is a violation of any law. Officer Nick
22 did not say that Ms. Clay's high beam lights caused any disturbance to him when he first saw

1 her at the intersection of North Port Boulevard, southbound on U.S. 41. The testimony is that
2 there is no other traffic on the road. The use of her high beam lights then could not have
3 interfered with any traffic since there was none on the road. So the only time that there is a
4 possible infraction of 316238 is when Ms. Clay turns onto Sumpter Boulevard, there is an on-
5 coming car flashes its lights at her and, according to Officer Nick's testimony, it was very
6 shortly thereafter; we've got two tenths of a mile, Your Honor. I mean that a pretty short
7 distance. He pulled her over. Now, its interesting because I guess at this point we don't really
8 know what he pulled her over for but I think that you can make an inference that he pulled her
9 over for the combination of things that he saw. And, it is our contention that, under Crooks
10 and an application of Crooks and reading it with 316238 that this is nothing more than a pretext
11 stop and we would ask the Court to grant the relief we're seeking and the relief that we're
12 seeking, Your Honor, is the suppression or the exclusion, I'll use that language since we're
13 going to do a Motion in Limine, the Exclusion of any evidence obtained after that stop. Thank
14 you.

15 Judge. Mr. Flaherty.

16 Prosecutor.

17 Yes, Your Honor. Simply put Crooks would only apply, I believe, if we only had a stop for
18 weaving. In this instance, it's clear that the Officer had the weaving and then also the failure
19 to dim lights under 316238 and the combination of the two certainly arouses to an agreeable
20 suspicion for a traffic stop in that instance and for DUI.

21 Judge. Ms. Mack, anything else.

22 Defendant's attorney. I have no further, Your Honor.

1 Judge. Okay, the Motion is denied. Are there any other preliminary matters?

2 Prosecutor. The State passes, Your Honor.

3 Defendant's Attorney.

4 For the record, I have no notice of any criminal (inaudible) in this matter.

5 Judge.

6 The rules stand on both so I think you need witnesses to leave that are not parties. It was in
7 both previously was it not?

8 Defendant's attorney.

9 I believe so, Your Honor. I believe that I invoked the Rule, previously, yes ma'am.

10 Judge. Okay.

11 Prosecutor. All except the corrections officer. He wasn't present that day. (Inaudible)

12 Judge. Okay. Sure.

13 Prosecutor.

14 The State, Your Honor, is first going to do a Motion to Exclude the Defendant's expert
15 witness, Rick Swope who was amended in Discovery to this State this past Monday and I
16 believe its been quarreless to continue with a Writston hearing at this point. That would be fine
17 or do you want me to place that in argument for the Writston hearing at this time?

18 Judge. No. We have to....We'll start with the (inaudible). What's the alleged violation?

19 Prosecutor. It's a late discovery of a witness, Your Honor.

20 Judge.

21 Let's see if I have a copy any where. Okay, I don't have a copy of their response. Didn't I get
22 part of it? Its Rick Swope isn't it?

1 Prosecutor.

2 Rick Swope was amended by the defense and, in fact, was in the State on Monday, February
3 22nd, this past Monday and the State will argue that this is a willful and a substantial and a
4 prejudicial violation to the State.

5 Judge. What does the Defense say?

6 Defendant's Attorney.

7 In response to what Mr. Flaherty had to say, those are all conclusions, Your Honor.

8 Prosecutor. Well, I'll give you more specifics. It depends on how you want to do this.

9 Defendant's Attorney.

10 I'll proceed if the Court wants me to. On or about August 21, 1997, Your Honor, we listed
11 Wayne Morris, M.S. as an expert witness. If I may. The Court doesn't have to go looking for
12 the files. There is my file copy. I don't think there is any dispute about that. When this case
13 was set for trial this time, this case has been set several times, Your Honor. When the case was
14 set this time, the State caused a Subpoena ducas tecum for trial to be served on Wayne Morris.
15 It was served on January 29, 1999. And, Mr. Morris,... I'll be happy to provide a copy, there
16 should be another one in the file as well, Your Honor. Mr. Morris called me and told me that
17 based on receipt of that subpoena, Mr. Morris has testified previously in this circuit - right here
18 in this courtroom as well as this courthouse. Mr. Morris basically told me that he was not going
19 to appear on behalf of Mr. Clay. I talked to him then when the case was set - when we picked
20 the jury - I had talked to him that morning of jury selection which would have been a Monday.
21 As the Court will recall, I was ill. There seems to be a plague here. But, when I had spoken
22 to him on a Monday after jury selection and told him when the case was going, I tried to get

1 him to change his mind to appear and he said that he was unavailable. There was no way that
2 I could do anything about it. Mr. Morris had appeared previously, Your Honor. I can't even
3 tell you how many times without the necessity of a subpoena by me and I think it's
4 inappropriate to subpoena an expert. They are either willing to come or they are not. So, I had
5 told Mr. Flaherty because he asked me that morning if Wayne was coming and I told him that
6 he was unavailable and I don't think Mr. Flaherty will dispute that. Later on, I discussed that
7 situation with Ms. Clay and she told me that she wanted to have an expert witness. She felt it
8 was very vital to her case and we undertook to find another expert, Your Honor. Richard
9 Swope is an expert who has testified in the State of Florida. He is not an unknown quantity.
10 In fact, he has testified in the Twelfth Judicial this month. So he is not unknown to the State.
11 I actually told Mr. Flaherty during the week prior to the time that I Faxed his name and a copy
12 of his C.V. to him on - told him, I'm going to say it was either a Tuesday or a Wednesday - but
13 I'm going on memory alone so I'm not going to say that that's absolutely the truth. It was
14 sometime during that prior week and I think it was a Tuesday or Wednesday but if Mr. Flaherty
15 disagrees, I certainly defer to what he has to say. He may have made some notes. I did not.
16 And, I told him that I intended to call Mr. Swope but that I was not certain and would not
17 know until Monday the 22nd whether he would be available because he was under subpoena to
18 appear in, I think it was Marion County and I want to say it was in Ocala. Doesn't matter but
19 I'm pretty sure I'm right. He said please fax me the C.V. as soon as you get it. I said I will.
20 I called for the C.V. Asked Mr. Swope to fax us a copy of the C.V. I felt that I could not list
21 him legitamitly unless I knew that he was going to be available. I didn't think I could do that
22 properly and so I did not. But I did verbally tell Mr. Flaherty. Now, they can't claim

1 ignorance, Your Honor. He just testified in the Twelfth Circuit within this month. I timely
2 provided him with the full curriculum vitae. I called him on Tuesday. I asked him if he had
3 gotten the C.D. He told me that he had. I asked him if he had spoken to Mr. Swope yet. He
4 told me that he had not. I urged him to do that. I told him that Mr. Swope had assured me that
5 he would be available Tuesday and Wednesday. I explained my trial schedule to Mr. Flaherty
6 and I urged him to bring any motions with regard to Mr. Swope to the Court's attention before
7 the Defendant incurred the expense of Mr. Swope coming here. I will tell you, Your Honor,
8 that Mr. Swope's fees, expert fees are \$1500 for the day. And, \$.40 a mile for travel. Ms. Clay
9 had paid to my firm upon Mr. Swope's instructions, a retainer of \$2000. Mr. Swope is here
10 and has been here. Mr. Swope has informed me this morning that he spoke with somebody
11 from the State Attorney's Office. I'm going to assume it was either Mr. Flaherty or Mr.
12 Hoffman. At least I certainly hope it was one of those two. For twenty to twenty-five minutes
13 yesterday and that he gave them - he didn't hold back any information. He told them exactly
14 what information he had been provided. He was provided a copy of all of the discovery that
15 the State had provided to me and a copy of the videotape. I'm going to assume that the State
16 asked him that. There was no reason for Mr. Swope to fail to disclose that. Furthermore, I
17 called Mr. Flaherty and I'm going to say it was sometime this week. And, I'm sorry Judge. I
18 really lost track of time of even what day today is but, sometime this week because Mr. Swope
19 wanted a copy of the annual inspection. The State faxed that to me and I faxed it on to Mr.
20 Swope. So, for them to claim surprise is - I'm astounded. Because, there is no surprise. The
21 State Attorney based on what Mr. Morris claims and, I can't speak for Mr. Morris, he feels
22 harassed and he has refused, essentially, to be our expert in this case for that reason. Now

1 that's what he has informed me and there's no way I'm going to call him down here to give that
2 testimony because obviously it's cost prohibitive for the Defendant to do that. I timely
3 informed them of Mr. Morris' reluctance and the fact that I was going to substitute an expert.

4 Judge. Is there anything else about prejudice to the State?

5 Defendant's Attorney.

6 No Your Honor. I don't think there is any, Judge. They have had ample opportunity to speak
7 to Mr. Swope. If there was a problem, I had urged Mr. Flaherty to let my office know. He
8 called Mr. Swope and Mr. Swope said "I'm not going to talk to you." Then, I would say,
9 Okay, now we have a problem. But that's not what happened Judge. He's known about that
10 since Monday. I verified it with him on Tuesday. It doesn't take four days to get prepared to
11 talk to an expert. They have somebody, I believe it's up in Manatee County, that just tried a
12 case with Mr. Swope. All they had to do was talk to that prosecutor to find out what they
13 wanted to know. I've heard nothing that indicates that they have not been adequately informed
14 or had the ability to be prepared.

15 Judge. Mr. Flaherty?

16 Prosecutor.

17 Your Honor, the facts that the State sees them are this. I believe as Mr. Swope told me this
18 yesterday on the phone, that Ms. Mack first contacted him the second week of January in
19 reference to this case and this case alone. He was then re-contacted later in February and asked
20 if he would be available as a witness to testify in this trial approximately the second week of
21 February - in that ball park, he said. He was then sent information by Ms. Mack, including, I
22 think, the videotape and maybe some of the monthly inspections and so forth - around the 19th

1 of February. He faxed his C.V. to Ms. Mack last Thursday. Okay? The first contact we had
2 from Ms. Mack's office and Tim Murphy will testify to this - I believe he took the phone call -
3 was that she...her secretary called our office last Wednesday or Thursday and said "Oh yeah,
4 Ms. Mack may be substituting her witness, we don't know who it is." I called back, talked to
5 her secretary, and said please inform us and send us the C.V. as soon as possible if it's not
6 going to be Wayne Morris. We prepared for Wayne Morris, we've subpoenaed Wayne Morris
7 and we were prepared on the February 2nd trial date for Wayne Morris. I called her office last
8 Wednesday or Thursday and talked to her secretary and said "Ma'am, please let me know as
9 soon as possible if it's going to change." The C.V. was sent, Rick Swope's C.V. was sent and
10 there's a notation on the bottom that it was sent to her office last Thursday. I did not hear
11 again from Ms. Mack until Monday morning. Ms. Mack contacted our office Monday morning
12 and said "Oh yeah", after approximately 12 o'clock said, "Oh yeah, I'm going to substitute
13 Rick Swope for Wayne Morris." Your Honor, Rick Swope if he's testified 100 times in
14 Manatee County, I've never heard of him before in my life. I didn't know what he testified to -
15 I never heard about him, I didn't know what he's an expert in. The C.V. was received at that
16 point. We spent, essentially, Your Honor, that means there's no point calling him because I
17 don't know what to talk to him about regarding this case. I don't know what his expertise is
18 in. I don't know what his background is in. There's no point of doing that. Over the course
19 of Monday and Tuesday, I contacted several State Attorneys' offices around the State to find
20 out who he's talked to and to try to compile some depositions, some transcripts, some
21 background on him for cross examination. Wednesday morning, we received over 500 pages
22 of transcripts on Mr. Swope. 500 pages Wednesday morning regarding different testimony he

1 has given around the State over the last four or five or six years. We've also contacted and
2 the State would like to call several of these 12 individuals who like to testify in rebuttal that Mr.
3 Swope is not as truthful as Ms. Mack is going to want to present him to be. And we have
4 rebuttal witnesses around the State. We were receiving faxes this morning from Rick Lauer at
5 the Department (inaudible) police department that completely contradicts what Mr. Swope has
6 said in prior testimony. He said he has testified before these men. The breath test technician
7 for 8 years at Broward Community College. Is that correct? This affidavit of this individual
8 says he never once did it. "I was responsible for the whole time, I would like to come testify
9 if that's what he is going to say." We have several individuals from all over the State and we
10 are receiving today several more pages of transcripts on this individual. Now, granted, we've
11 had a day to put this together. We've had a day to read 500 pages of transcript. That doesn't
12 give time and enough ability to put together a coherent, incognative and organized cross
13 examination especially when there's witnesses that won't be able to come into Court and testify
14 in rebuttal to what he has to say. The State is absolutely prejudice by this instance and by Ms.
15 Mack's tactics in this matter. We were prepared for Wayne Morris and when she said Wayne
16 Morris wasn't coming in and we picked a jury with the understanding that it would be a one-
17 day trial.. Now with this added witness this certainly, at least in my opinion, will not be a one-
18 day trial and this jury will either be here until 12:00 or 11:00 o'clock tonight.

19 Judge. No jury is here past the regular working hours.

20 Prosecutor.

21 Okay, Your Honor. Then additional prejudice to the State would be if we had to bring this jury
22 back three weeks from now or so and the State would be forced to put on their case today, the

1 jury would be brought back in three weeks from now, another jury period.

2 Judge.

3 The jury would not be brought back three weeks from now. The jury would be brought back
4 on Monday.

5 Prosecutor.

6 Okay. I just thought we had other stuff to do Monday. That's fine to bring them back
7 Monday, Your Honor. You know, it's prejudice to the State that we can't bring in witnesses
8 on a Monday from all over the State to rebut this guy's testimony unless the State.....

9 Judge. Ms. Mack?

10 Defendant's Attorney.

11 Your Honor, I offer to the Court a copy of the nine page curriculum vitae of Mr. Swope. Nine
12 pages. The State has not called my office. I specifically told Mr. Flaherty that I would be
13 available on Tuesday and Wednesday that I was in trial. He has had ample opportunity to set
14 up a deposition of Mr. Swope. I haven't heard him say that this gentleman, whoever he is, that
15 sent him this fax is unavailable to come over here. I haven't heard him say that, Judge. I have
16 never represented to anybody that this was a one-day trial. Never. The State has three or four
17 witnesses, Your Honor. They've always added three or four witnesses and I have personally,
18 have never represented to anybody that this is going to be a one-day trial so, I don't see where
19 the prejudice to the State is. If they want to call somebody to rebut what Mr. Swope may or
20 may not say, there is nothing to prevent them from doing that. Nothing to prevent them from
21 doing that. They've got every piece of information that they need. I cannot do anything
22 underhanded - if anything, I was put in a... my client was put in a highly prejudice position by

1 the harassment that the State of Florida, Twelfth Judicial Circuit State Attorney's Office has
2 placed on Mr. Morris. He absolutely refused to come, Your Honor. I informed the State of
3 that as soon as I was certain that I was certain he could not come. And I did everything I could
4 to find another expert. Knowing Mr. Swope, You Honor, I probably know five DUI experts.
5 That doesn't mean that they're all going to be available. I'm I supposed to just list them all so
6 that they all have depositions taken? That's not the purpose, Your Honor. This is just a
7 substitute witness. He's going to testify on the very same issues. It's clearly set forth in his
8 curriculum vitae what his expertise is. So, I again fail to see any prejudice with the State.
9 There's two of them - there's one of me.

10 Judge.

11 Mr. Flaherty, who is... Ms. Mack had said somebody had talked to the proposed witness earlier
12 in the week. Who was that from your office?

13 Prosecutor.

14 The first time I saw Mr. Swope was yesterday morning. I called him on Wednesday when we
15 first got the information coming in. There's no point calling him, Your Honor, until I got all
16 of his information to see if I could talk to him about his background and prior testimony.

17 Judge. I asked. You're not answering my question.

18 Prosecutor. I talked to him yesterday morning.

19 Judge. And for how long.

20 Prosecutor.

21 20 minutes. Your Honor, if I may, also, he is going to testify to different expertise than Wayne
22 Morris. He's also going to try and attempt to be tendered an expert on sobriety exercises and