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

STATE OF FLORIDA, : CASE NO. 99-000897MM10
 : JUDGE ROBERT S. ZACK
 :
 :
 v. :
 :
 MICHAEL SCOTT DOLAN, :
 :
 Defendant. :
 :

The above-entitled cause came on hearing 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 21th day
of June, 1999, commencing at 9:00 a.m..

JURY TRIAL (EXCERPT)

APPEARANCES:
MICHAEL J. SATZ, STATE ATTORNEY'S OFFICE,
BY: RON PLIEGO, ESQUIRE
ASSISTANT STATE ATTORNEY
Appearing on behalf of the State of Florida.

EVELYN ANN ZIEGLER, ESQUIRE
Appearing on behalf of the Defendant.

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I N D E X

- - -

<u>DEFENDANT WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
<u>RICK SWOPE</u>			
By Ms. Ziegler	3		59
By Mr. Pliego		42	

1 Thereupon, the following proceedings were had:

2 *****

3 THE COURT: Are you calling any witnesses?

4 MS. ZIEGLER: Yes, Judge. We would call Mr.
5 Swope.

6 Judge, could I have an opportunity for just a
7 few minutes to show him some of the documents that I
8 didn't receive in discovery and talk to him?

9 THE COURT: We'll take a 15 minute recess.

10 Tell the jury to walk around for 15 minutes. I
11 want them back at 4:15.

12 MS. ZIEGLER: Do I have permission to take the
13 exhibits into the hallway?

14 THE COURT: Sure.

15 (Thereupon, a 15 minute recess was taken, after
16 which the following proceedings were had:)

17 THE COURT: Let's bring in the jury.

18 (Thereupon, the jurors were escorted back into the
19 court room, after which the following proceedings were
20 had:)

21 THE COURT: Ladies and gentlemen, the State has
22 rested.

23 Defense, care to call any witnesses or put on any
24 testimony?

25 MS. ZIEGLER: Yes, Judge. The defense calls Mr.

1 Rick Swope.

2 THE CLERK: Raise your right hand, please?

3 WHEREUPON,

4 RICK SWOPE,

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

7 THE WITNESS: I do.

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

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

11 DIRECT EXAMINATION

12 BY MS. ZIEGLER:

13 Q Well, you have told us your name. What is your
14 occupation?

15 A I do primarily accident reconstruction. I also do
16 some consulting in the field of DUI investigation, which
17 encompasses breath testing devices. And also, field
18 sobriety exercises.

19 Q What expertise do you have in the maintenance and
20 use of the Intoxylizer 5000?

21 A Well, I was doing maintenance for several years
22 when I was a police officer. I was a police officer for 15
23 years.

24 Q With what department?

25 A Broward Sheriff's Office. Six of those years, I

1 was with the Broward Sheriff's Office. I was in the Traffic
2 Enforcement and DUI Enforcement division. For four of those
3 six years, I was Administrative Coordinator of the unit.

4 I actually was doing maintenance on different
5 types of machines. The intoxylizer, the series used in this
6 case, came into Florida I believe, in 1985. And it was put
7 in as the main -- or as the only machine in use, I believe,
8 in 1987.

9 And I left the department in July of 1990. So I
10 had several years of experience with it prior to leaving.
11 And then, I have had -- I still work on the machines now,
12 currently.

13 Q And in what capacity do you work on the machines,
14 currently?

15 A Well, there are private law firms that have
16 intoxilyzers. And also, private industries that have the
17 intoxylizer machines.

18 And I also work with Florida International
19 University. They have an intoxylizer that they received
20 under a grant. And I am maintaining their machine for them
21 for scientific reliability.

22 And I also do experimentation on other machines,
23 as well, for other articles, and sometimes cases and those
24 types of things.

25 Q What is your educational background?

1 A Well, I have a Bachelor's Degree in Criminal
2 Justice from St. Thomas University. And a Master's of
3 Science Degree in Technology and Engineering from the
4 University of Miami.

5 I am an instructor. I have instructor
6 certification with the National Highway and Traffic Safety
7 Administration. I also have certification with the Criminal
8 Justice Standards and Training Commission in the State of
9 Florida.

10 And I did the initial education with the machine
11 starting -- or breath testing devises, starting in 1974.
12 And I keep current on it and do experiments and those types
13 of things.

14 Q Do you as part of your job on occasion train
15 police officers to use the intoxylizer?

16 A I have trained police officers to use the
17 machine. I am not certified to sign off on their permits.
18 I sign off on their certificates for field sobriety
19 exercises, but not for the intoxylizers.

20 Q Do you train officers on how to conduct field
21 sobriety tests?

22 A Yes.

23 Q Are you familiar with field sobriety tests?

24 MR. PLIEGO: I object, Your Honor. They're not
25 tests. They're exercises.

1 THE COURT: Sustained.

2 MS. ZIEGLER: I' m sorry. I apologize.

3 Exercises.

4 BY MS. ZIEGLER:

5 Q Let me ask my question again.

6 Are you trained in conducting field sobriety
7 exercises?

8 A Yes.

9 Q In terms of the Intoxylizer 5000 have you yourself
10 as a law enforcement person tested people with using that
11 test?

12 A Yes.

13 Q And you have also maintained those machines?

14 A Yes, I did.

15 Q And can you tell this jury how those machines
16 work?

17 A Well, the intoxylizers are actually three series
18 of machines. The State of Florida uses two. And primarily,
19 they are a breath testing devise where a sample of breath is
20 put into the machine through a heated tube. It's analyzed
21 in a chamber.

22 And basically, the machine is meant to decipher
23 the difference between room air, such as we are breathing
24 now, and air that contains ethanal or alcohol vapors.

25 And really, an easy way to figure out how the

1 machine works is that if I had a balloon and I blew that
2 balloon up here in court and I shined a light through the
3 balloon and measured the amount of light that would come out
4 of one end, I would get whatever the amount of the reading
5 is.

6 If I took a puff of smoke or something and blew
7 into the balloon, that would eliminate a certain amount of
8 light passing through the balloon because of the smoke. If
9 I could measure the difference between the two, that is
10 basically the same way that the intoxylizer works.

11 Q And have you reviewed this particular machine
12 that was used in this case?

13 A Yes, I did.

14 Q Have you reviewed maintenance records?

15 A Yes.

16 Q And the breath test affidavit?

17 A Yes, ma'am. I have.

18 Q And the test slip?

19 A Yes.

20 Q And the agency inspection reports?

21 A Yes, ma'am.

22 Q And you have reviewed those documents?

23 A Yes.

24 Q Okay. Did you also review the police reports and
25 the probable cause affidavit in this case?

1 A Yes, I did.

2 Q And do you feel that you're familiar with the
3 facts of this case?

4 A I believe so. Yes.

5 Q Let me ask you something in terms of, what does
6 the intoxylizer actually measure?

7 A Well, it actually, numerically it gives you a
8 reading based on what is in your breath. But the machine
9 works on what actually is in your blood.

10 Q Can you explain that?

11 MR. PLIEGO: Your Honor, I am going to object at
12 this point.

13 THE COURT: What's the grounds?

14 MR. PLIEGO: The witness is giving an expert
15 opinion and hasn't been tendered as an expert.

16 MS. ZIEGLER: Judge, I don't believe I have to
17 officially tender him as an expert.

18 THE COURT: If you want him to testify as an
19 expert, you do. If not, I am not going to allow him to
20 testify as to these things. Because in my mind, that
21 is something that is in an expert's area. Not a lay
22 person.

23 MS. ZIEGLER: Judge, at this time, I would move to
24 tender Mr. Swope as an expert in the Intoxylizer 5000,
25 it's maintenance, and it's use. And also, in the field

1 of sobriety testing.

2 THE COURT: Your response?

3 MR. PLIEGO: Your Honor, I would like -- my first
4 response is again, they're not field sobriety testing
5 exercises.

6 MS. ZIEGLER: Exercises.

7 MR. PLIEGO: They're exercises. Only a lay
8 opinion should be allowed. It's not scientific. They
9 are for lay observations, only. That's why they are
10 done that way.

11 The officer testifies as to the observations that
12 he notices. There is nothing scientifically reliable
13 about them. They are just an indicator to show
14 observations that may indicate somebody is impaired.

15 So I would object to him being qualified as an
16 expert in the field of sobriety exercises.

17 THE COURT: What about him testifying as a police
18 officer for 15 years?

19 MR. PLIEGO: Your Honor, I would like to be able
20 to voir dire the witness.

21 THE COURT: You didn't answer my question.

22 What about the fact that he has been a police
23 officer for 15 years? Wouldn't that let him at least
24 testify as a police officer? Not necessarily an
25 expert?

1 MR. PLIEGO: Your Honor, there is --

2 THE COURT: Yes or no?

3 MR. PLIEGO: I don't think he can testify. My
4 point is, you can't testify as an expert on field
5 sobriety exercises.

6 THE COURT: I agree with you, he is not an expert.
7 I am not going to accept him as an expert in that. But
8 I will let him testify about what he knows from being a
9 police officer for 15 years since he was a police
10 officer for 15 years.

11 As far as the intoxylizer is concerned, I think
12 his qualifications are such that the jury can consider
13 his testimony expert testimony.

14 I don't certify anybody as an expert. It's up to
15 them. He can testify with regard to the intoxylizer.
16 It's up to them to decide whether or not he is an
17 expert or if he knows what he is talking about.

18 MR. PLIEGO: But not as to the field exercises?

19 THE COURT: Do you want to read that back?

20 Go ahead.

21 BY MS. ZIEGLER:

22 Q Mr. Swope, what makes a person intoxicated where
23 we as a society are concerned about them driving? Is it
24 alcohol in your breath? Or alcohol in your blood?

25 MR. PLIEGO: I am going to object to that, Your

1 Honor.

2 THE COURT: Overruled.

3 THE WITNESS: Alcohol in your blood system.

4 BY MS. ZIEGLER:

5 Q Can you explain that?

6 A Well again, I guess an easy way to explain it
7 would be that if I took a drink right now on the stand and
8 kept it in my mouth, and I spit it out, the volume that I
9 consumed, I certainly would have alcohol in my breath. And
10 the machine would certainly pick it up. And I would have a
11 volume of alcohol in my mouth.

12 If you smelled me or whatever, although I would
13 not be impaired because it's not in my bloodstream, it's
14 just in my mouth, once it gets into my bloodstream and
15 affects my vision and mental faculties and normal daily
16 judgments and those types of things, that's where it impairs
17 you and your judgement and ability to operate a car.

18 Q Even though all we are hearing about is a breath
19 machine and breathalyzer results, it's really the blood
20 alcohol that is what makes someone intoxicated?

21 A That's correct. It's what is in your blood that
22 impairs you.

23 Q And this machine measures a breath sample,
24 correct?

25 A Yes, it does.

1 Q But what is the result that it reads out?

2 And let me show you the exhibit, State's Exhibit
3 Number Four, which shows a readout from that machine.
4 (indicating)

5 A Okay. Want me to tell you what the readout is?
6 Is that what your question is?

7 Q Yeah. What units of measurement is the readout?

8 A The readout is grams per 210 liters, which really
9 is a unit of measurement.

10 And it takes --

11 Q Liters of air?

12 A Right. Grams per 210 liters of air. It's a unit,
13 and it measures by volume and weight.

14 Q So it is reading out a measurement of air?

15 A Yes.

16 Q And it's doing that from the breath sample?

17 A Yes, ma'am. Correct.

18 Q So it's not measuring blood alcohol level?

19 A Well, the reading on the card measures in breath
20 alcohol concentration. But a proportional relationship
21 exists between what is in your breath and what is in your
22 blood. So actually, the machine converts it over to a
23 breath sample.

24 I know it's kind of confusing. But the machine
25 originally read out in blood alcohol. And it was changed a

1 few years ago to read breath alcohol concentration.

2 Q So the machine is taking a breath sample,
3 calculating a blood alcohol level, and then transposing it
4 into a breath alcohol sample?

5 A Yes. Basically, that is what the machine does.
6 Correct.

7 Q Let me ask you in that step from where it's at the
8 blood alcohol level and now turning into a breath alcohol
9 level.

10 You said that there is a proportional relationship
11 between the alcohol you would find in someone's breath?

12 A Right.

13 Q As compared to the alcohol you would find in their
14 blood?

15 A Right.

16 Q Tell me about that? Is that something that is a
17 set number? Or what? Tell us about that?

18 A The number that the machine is set on is that
19 there is 2100 liters of air is equal to one cc of blood.

20 So as the blood passes through your body, it goes
21 through your lungs and goes through your air sacs and lungs,
22 and is actually blood. It doesn't come out, but breath
23 passes through your lungs and near your blood system and
24 comes up through your breath. And that's what the machine
25 measures. So it measures on a fixed scale of 2100 to 1.

1 Q Okay. And that proportion of 2100 to 1, that is
2 used in every readout that that machine makes?

3 A Every one. Yes.

4 Q So let me ask you, the relation -- that
5 proportion between someone's breath alcohol to their blood
6 alcohol, is that the same for every person?

7 A No.

8 Q Okay. Well, tell me about that?

9 A Well, people that consume alcohol or have alcohol
10 in their system, obviously as you drink alcohol, your level
11 rises. If you drink more alcohol, your level of impairment
12 will increase.

13 There comes a point where when you stop drinking.
14 And your body then will then absorb all the alcohol from
15 your system, and you reach what is called a "Peak."
16 Whatever that peak would be, you then begin to burn off
17 alcohol, and you begin to come down.

18 The machine measures everyone based on one
19 number. And some of the population and studies vary. So I
20 can't give you a number. But the studies vary that some
21 people obviously absorb and eliminate alcohol quicker than
22 others. And therefore, that will change their partition
23 ratio, meaning the reading you see could be artificially
24 high or artificially low.

25 Q So that 2100 to 1 ratio or proportion between what

1 you find in the breath to what you find in the blood varies
2 from person to per person?

3 A It varies from person to person. And again, if
4 you have a high reading, .19 or .20, which is about double
5 this case, those arguments really don't matter. Because the
6 reading is so high that if you're off a little bit, the
7 machine isn't going to matter.

8 But this reading is so close to the original
9 borderline that if you are a little bit high or low, this
10 reading is going to be magnified.

11 Q What are some of the things that influence that
12 proportion between your blood alcohol level and the blood
13 alcohol?

14 For instance, would a big person, large person,
15 versus a small person make a difference?

16 A Yes, it can. Depending on the person. But
17 usually weight, sometimes race, sex, the amount of food that
18 you may have consumed, the activity the person has.

19 Some people are in better shape than others. A
20 lot of things affect the ultimate conclusion.

21 Q Fitness level, also?

22 A Sure.

23 Q So that is something within the calculations that
24 that machine makes to readout that card that really is not
25 accurate for everybody?

1 A Right. It's a one number fits all, basically.

2 Q And scientific studies show that one number does
3 not fit all?

4 A That's correct.

5 Q Now you in your experience as a police officer,
6 can you tell me in terms of signs of intoxication, we have
7 heard about eye's bloodshot, face flushed, the smell of
8 alcohol, are those indicators of intoxication?

9 MR. PLIEGO: Object to the word "Intoxication."
10 The State has to show the person is impaired. Not
11 intoxicated.

12 THE COURT: Overruled.

13 THE WITNESS: Those are some signs that officers
14 look for. As far as observing somebody as to what
15 -- certainly, it means that somebody has been drinking.
16 It obviously doesn't mean they are impaired. But it's
17 an indicator to an officer that someone has been
18 consuming alcohol. And there are other factors the
19 officer takes into account.

20 BY MS. ZIEGLER:

21 Q We have also heard factors like slurred speech and
22 stumbling or swaying when you are walking?

23 A Yes.

24 Q Would those be normal faculties that are impaired
25 by alcohol?

1 A That can be impaired. Yes.

2 Q If somebody showed -- did not have slurred speech
3 but was speaking properly and correctly and was walking fine
4 and appropriately --

5 MR. PLIEGO: Object to the leading nature, Judge.

6 THE COURT: Overruled.

7 BY MS. ZIEGLER:

8 Q But had these other signs of bloodshot eyes,
9 flushed face, and the smell of alcohol, could you make any
10 conclusion about intoxication from somebody with that type
11 of evidence?

12 A For impairment?

13 Q Right.

14 A Well, most likely you could. You could if you had
15 all those factors together, you could make an opinion. Yes.

16 Q But would the fact that the person's speech was
17 fine and their walking was fine, would those be stronger
18 indicators to you than the smell of alcohol, for instance?

19 A Yes. Again, the smell would indicate someone has
20 been drinking. It does not mean they are impaired. The
21 impairment issue goes back to the questions you just had if
22 there's stumbling or slurring.

23 Q So somebody can have a flushed face?

24 A Yes, they can.

25 Q Or bloodshot eyes?

1 A Yes.

2 Q And that could be for numerous reasons?

3 A Yes, ma'am.

4 Q We have heard some testimony about mouth alcohol
5 in relation to testing by the Intoxylizer 5000?

6 A Yes.

7 Q Can you tell us why we have this 20 minute
8 observation period?

9 A Well, for the officers to make sure that nothing
10 has been taken by mouth or there is no regurgitation. And
11 also, because of the slope detector on the machine.
12 Sometimes it works, and sometimes it is not able to detect
13 alcohol. It only detects it in very high volumes.

14 Q Okay. Well, we have heard that there is something
15 in the intoxylizer itself that if it detects mouth alcohol,
16 it will pop up and refuse to take a sample.

17 Isn't that something we can rely on here?

18 A No.

19 Q Why not?

20 A Well, the mouth alcohol detector does work at a
21 very extreme high volume of alcohol. I mean, the volumes of
22 alcohol that it picks up would be basically, you would be
23 dead. It picks up a .4 and .5, which basically, you would
24 be dead. That's what it picks up.

25 It will also pickup where if you have alcohol and

1 have taken a drink. And it's fresh in your mouth. It
2 sometimes will pickup high volumes. But no officer takes
3 somebody in and gives them a drink and then waits 20 minutes
4 and let's them blow. Obviously.

5 People are in custody for a period of time and
6 they go into the machine and wait. So if they burp or they
7 have done anything, you know, what we call a wet burp where
8 they kind of burp it up and swallow without actually
9 spitting, I know it's kind of bad, but those things probably
10 would not be picked up in most cases because the
11 concentration is not super high, and the machine only picks
12 up things very very high in concentration.

13 Q Could that influence a reading and make it appear
14 higher than what the person's blood alcohol level really
15 was?

16 A If there is mouth alcohol, it can. Yes.

17 Q You can't depend on the safeguards in the machine?

18 A Well, not really. The purpose of having the 20
19 minute rule, also, is for the officer to visually watch.
20 And it's just kind of a second step the officer uses to
21 ensure that nothing is taken also, as long as they are
22 watching.

23 Q Would you be concerned if at the same time the
24 officer was watching, the officer was doing paperwork on
25 something?

1 A Yes, I would be.

2 Q Why is that?

3 A Well again, you want to keep an eye on the person.
4 And again, especially, because you have a low reading.

5 Again, a higher reading really doesn't matter in a
6 lot of cases. But on the low reading, or what I call a very
7 low reading with an .09 and .11, you have to make sure you
8 watch the person so nothing unusual happens for the breath
9 test.

10 Q Would it be against any type of FDLE rules or
11 regulations to be doing paperwork during that 20 minute
12 observation period?

13 A I don't think there is anything to say they can't
14 do paperwork. They just have to keep the person in
15 observation and make sure they are watching the person so
16 nothing is taken by mouth or brought up by mouth.

17 Q Now the maintenance records you have reviewed, did
18 I hand them to you?

19 A No. You just handed me the card.

20 Q Can you describe how these machines are checked to
21 make sure they are working properly?

22 A Well, they are checked every calender month by
23 maintenance operators and they are given these solutions
24 that they place in the machine.

25 They do a series of checks. And once each

1 calender year, the machine is checked by the State, which is
2 called a yearly inspection.

3 And they just run a series of tests on the machine
4 to make sure it's in compliance. And it takes about -- a
5 monthly maintenance operator from the Sheriff's Office could
6 probably do the machine in about 30 minutes, give or take.

7 Q Okay. Do you somehow get a known sample that you
8 know what the alcohol amount is in the sample, and run it
9 through and see how the machine reads out?

10 A Well, in theory, yes. But they don't do that.

11 Q Well, when you say, theory, are you talking about
12 the people who maintain this exact machine?

13 A Well, the Sheriff's Office or any maintenance
14 operator in the State. Correct.

15 Q Well, the Broward Sheriff's Office?

16 A Right.

17 Q Okay. What do they do?

18 A Well, they get a certified solution from the
19 Florida Department of Law Enforcement. It could also be
20 from Booth Laboratories. I don't know which one they use,
21 because it's not in the paperwork. But one of those two
22 places.

23 They get a solution. The stock solution is only
24 to the second digit. Yet, the machine reads to the third
25 digit.

1 Q What do you mean by that?

2 A Well, the machine reads to the thousandths, as you
3 saw on the readings on this card. But they only check it to
4 the hundredth. The machine is allowed by rules to be off,
5 plus or minus, .005.

6 What happens when you use a solution to the second
7 digit, you therefore because your third digit has to be
8 within .5, in other words, up or down, if the machine is
9 off, let's just say, .2, and the solution is off say, .4, or
10 .3, depending --

11 Q You mean, .00?

12 A Right.

13 Q .002?

14 A Point two thousandths, I am talking about right
15 now. If that is off to the thousandths, if one is high and
16 one is low, you can bring the machine up to meet to the
17 middle, depending on where that compliance reading is, and
18 the machine could be outside of the State compliance but you
19 would never know it because they don't know what the
20 solution is.

21 Q With the Court's permission, could you show the
22 jury where on this document the test solutions are only to
23 the hundredth and not thousandth?

24 A They are not on here. They are on here as far as
25 what you read, on Form 24, if that is what you are referring