

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

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STATE OF FLORIDA,

vs

No. 96-013196 MM10A  
Judge Peggy Gehl

**JEFFREY ALLEN DZIKOWSKI,**

Defendant.  
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Fort Lauderdale, Florida  
April 1st, 1998  
9:00 a.m.

The above-entitled cause came on for trial before the Honorable PEGGY GEHL, Presiding Judge, at the Broward County Courthouse, 201 Southeast Sixth Street, Fort Lauderdale, Florida, on the **1st day of April, 1998,** at 9:00 a.m.

EXCERPT OF PROCEEDINGS  
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**ORIGINAL**

1 APPEARANCES:

2 MICHAEL J. SATZ, STATE ATTORNEY,  
3 BY: KEN GOLLESBY, ESQ.,  
4 Assistant State Attorney,  
5 COREY LEIFER, ESQ.,  
6 Assistant State Attorney,  
7 Appearing on behalf of the State of Florida.

8 LLOYD H. GOLBURGH, P.A.,  
9 BY: LLOYD H. GOLBURGH, ESQ.,  
10 Appearing on behalf of the defendant.

11 I-N-D-E-X

12 4-1-98

13 PROCEEDINGS:

14	<u>DEFENSE WITNESS:</u>	<u>DIRECT</u>	<u>VOIR DIRE</u>	<u>CONTINUED DIRECT</u>
15	Rick Swope	3	12	20
16		<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
17		50	67	72
18			74	75
19			76	78

20 E-X-H-I-B-I-T-S

21 Defense Exhibit A

22 PAGE  
23 43

1 was examined and testified, as follows:

2 DIRECT EXAMINATION

3 THE CLERK: State your first name and spell your last  
4 name for the record.

5 THE WITNESS: Rick Swope, S-W-O-P-E.

6 Q. (By Mr. Golburgh) Mr. Swope, what kind of work do you  
7 do?

8 A. I do, primarily, accident reconstruction. And I do  
9 -- About ten percent of my business encompasses doing breath  
10 testing experiments. I work with breath testing, teach breath  
11 testing, and I do seminars around the country. I do the  
12 experiments, I write articles on it, and I also do some work in  
13 the field of field sobriety exercises.

14 Q. What qualifies you to do -- First of all, let me ask  
15 you, you talked about breath testing, do you do any work with  
16 the Intoxilyzer 5000?

17 A. Yes.

18 Q. How long have you been working with the  
19 Intoxilyzer 5000?

20 A. Since late 1984 earlier '85. That's when, basically,  
21 it was brought into Florida. Either it was late '84 or early  
22 '85.

23 Q. How long have you been around breath testing  
24 equipment.

25 A. Since 1974.

1 Q. What about field sobriety exercises? You mentioned  
2 that you also teach field sobriety exercises, true?

3 A. Yes.

4 Q. Okay. Now, what qualifies you to do that?

5 A. Well, I was a police officer for 15 years. I went  
6 through -- During that time I went through the required courses  
7 in the area of field sobriety exercises and testing. I went  
8 through approximately 80 hours, originally, of field sobriety  
9 training. After that, the initial time -- The 80 hours was a  
10 certified course. After I went through that, [REDACTED]  
11 me to become an instructor.

12 Q. When you say the State, who do you mean?

13 A. Well, the Criminal Justice Institute. At that time,  
14 they were looking for instructors to teach in the area of field  
15 sobriety exercises, and they chose, probably, about 25, 35  
16 people, the State chose initially.

17 And I went through school put on by the Federal  
18 Government which was the National Highway Traffic Safety  
19 Administration. That school was actually broken into segments.  
20 It was a DUI instructor course, which was 40 hours, and then  
21 there was 80 hours, specifically an instructor course. And  
22 then there was another 40-hour testing period. After that, I  
23 don't recall now, how many hours we had to teach with another  
24 instructor. It was like 30 or 40, something like that.

25 Q. Who did you teach -- Well, who do you teach field

1 sobriety exercises and breath testing on the Intoxilyzer 5000?

2 A. Well, primarily it was police officers. I've  
3 lectured to attorneys and Judges, and both defense and  
4 prosecution, and some investigators. There are people that are  
5 from other fields that attend, like insurance adjusters and  
6 things like that, attend occasionally.

7 Q. You said you were a police officer for about 15  
8 years, who did you work for?

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 A. Well, that meant that [REDACTED] g. I  
16 [REDACTED]  
17 [REDACTED]

18 When the unit first started, the State had several  
19 machines that were put in place. In other words, there were  
20 several different types of testing devices.

21 Q. In addition to the Intoxilyzer 5000?

22 A. Right. Well, the Intoxilyzer wasn't approved at that  
23 time. It was just a machine that we were using as kind of a  
24 back-up. The State, at that time, had many different testing  
25 devices, so they were trying to get one device.

1 Q. Around what time was this?

2 A. Um, that would be late '85. We were using the  
3 machine in '85 as a back-up. In other words, we would give a  
4 test on the certified machine and then we'd use back-up,  
5 because we were running different types of tests to see how it  
6 worked versus the machine we were using.

7 Eventually, the State did adopt that machine, at  
8 least the series of machines. And during that time, I took all  
9 of the required courses and began teaching in that area, with  
10 the machines, and went on from there.

11 Q. Do you still do any work with the Intoxilyzer 5000?

12 A. I do a lot, yes.

13 Q. Can you go into that a little bit, what you actually  
14 do?

15 A. Well, I maintain a couple of machines for private  
16 industry or private firms. And I also work with the machine at  
17 FIU University. They received the machine about six or seven  
18 months ago to use in experiments. They received a grant to do  
19 testing, and I maintain that machine to do experiments.

20 ~~There's a group of about four of us, usually~~  
21 that actually teaches breathalyzers to attorneys, etcetera.  
22 And when I say we, there's a group of about four of us, usually  
23 like two or three of us get together and do all kinds of  
24 testing.

25 There's three models of Intoxilyzers and we do all

1 kinds of experiments. We tear them apart. We run controlled,  
2 scientific experiments on them. We do all kinds of different  
3 things with the machines to see what works, what doesn't work,  
4 why something works, why it doesn't work. We do what's called  
5 blood and breath testing, also.

6 Q. Now, what kind of educational background do you have?

7 A. Well, besides being a police officer, ~~\_\_\_\_\_~~  
8 ~~\_\_\_\_\_~~

9 ~~NOTE~~ I was an instructor for the National Highway Traffic  
10 Safety Administration for the Department of Transportation.  
11 Adjunct Faculty. I taught at the University of North Florida,  
12 Jacksonville; University of Louisville, Kentucky, Southern  
13 Police Institute. I have a Bachelor's Degree in Criminal  
14 Justice from St. Thomas University. I have a Master's of  
15 Science Degree in Technology and Engineering from the  
16 University of Miami. I hold various permits to teach, and  
17 things like that, around the country, around the state. I'm  
18 certified by the Broward School Board.

19 You have to be certified in some county in the state  
20 to be able to teach all around the state, and I happen to be  
21 certified in Broward. And I've taught at Broward, Palm Beach,  
22 and Dade Counties. I've taught at Emory University in Georgia  
23 and Harvard Law School in Massachusetts. And I've thought at,  
24 virtually, every major city --

25 ~~\_\_\_\_\_~~

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~~... you're extremely concerned with both the defendant's  
... testing instrument, and also ...~~

~~... Yes~~

Q. Okay. Have you ever been qualified before as an  
~~expert in testimony of these subjects?~~

~~... Yes~~

~~... to the ... ability?~~

~~... Yes~~

~~... about ...~~

~~...~~

~~... how many ...?~~

~~... Over 600.~~

Q. As an expert?

A. Yes.

Q. Do you receive a fee, now, to come in and testify?

A. Yes, I do.

Q. Okay. Do you testify on behalf of only defendants?

A. No.

Q. Who else do you testify on behalf of?

A. Well, I have testified, obviously, when I was an officer for the State. I've also testified since I've left the State appointment. I testified for the State on a few occasions. I do -- Defense work is not just misdemeanors, but it's also felonies. In other words, I do a lot of work defending police departments or police agencies, where officers



1 may have been sued for something they've done. So I do work in  
2 that field as well, municipalities, those kinds of things.

3 Q. I'm going to, obviously, ask you a series of  
4 questions about breath testing, the Intoxilyzer, and field  
5 sobriety exercises. You did receive a fee to testify in this  
6 case from Mr. Dzikowski?

7 A. Yes, well, through your office. I assume it was from  
8 him.

9 Q. How much did you get?

10 A. Well, I charge, normally, a \$500 retainer on this  
11 type of case. I charge different fees for accident  
12 reconstruction cases. I charge a \$500 retainer. I bill at  
13 \$125 per hour. If it goes over four hours of work, then I bill  
14 at that rate.

15 Q. All right. Now, obviously you haven't heard any of  
16 the questions that I'm going to ask you, but would your  
17 testimony change if you were testifying about breath testing,  
18 breath testing machines, and field sobriety exercises?

19 MR. GOLLESBY: Objection, Judge, self-serving.

20 Judge, I'm not concerned with what he's being paid. And  
21 not only that, Judge, I'll qualify him as an expert in the  
22 field of breath test equipment, but I will lodge an  
23 objection if the co-counsel wants to qualify him as an  
24 expert in field sobriety.

25 THE COURT: I'll overrule the objection. You can

1 answer, Mr. Swope.

2 Q. (By Mr. Golburgh) Would your testimony change,  
3 depending upon who asks the questions, either the State or the  
4 Defense, on breath testing, breath testing machines, or field  
5 sobriety exercises, depending upon who's paying?

6 A. No.

7 Q. Why is that?

8 ...A. Well, the testimony is the same. It just happens I'm  
9 here for you today. And whatever the prosecutor asks, I'll  
10 answer his questions as best I can.

11 Q. Okay. Have you ever been published?

12 A. Yes.

13 Q. Where?

14 A. Well, I've been published in the -- there's a DUI Law  
15 and Science Journal. I've had three articles published there.

16 I've recently published as a co-author with Robert Reiff in the  
17 Michie --

18 THE COURT REPORTER: I'm sorry, the name please?

19 THE WITNESS: The Michie, M-I-C-H-I-E.

20 Q. (By Mr. Golburgh) On what subjects?

21 A. Vehicular homicide as it relates to DUI drivers.

22 MR. GOLBURGH: Your Honor, at this time, I would  
23 tender Mr. Swope as an expert in field sobriety exercises,  
24 breath testing equipment, and the Intoxilyzer 5000.

25 MR. GOLLESBY: Judge, I have no problems with him

1           qualifying. I'm going to lodge an objection, depending on  
2           what he's going to testify to, regarding field sobriety  
3           exercises. And no objection as an expert.

4           THE COURT: The Court would accept him on the breath  
5           test or the Intoxilyzer, but I didn't here enough on the  
6           field sobriety exercises.

7           Q.     (By Mr. Golburgh) Mr. Swope, were you trained to  
8           administer and observe field sobriety exercises throughout the  
9           term of your career?

10          A.     Yes.

          Q\    What kind of training did you receive as a police  
          officer to administer and observe field sobriety exercises?

          A.     Well, the training I received, I think I indicated  
          prior to being an instructor was, I had two 40-hour courses in  
          field sobriety exercises. At that time, the course was  
          40 hours. Several years later, the scale went back to 21  
          hours. But originally it was 40. So I received two of those  
          classes. Part of those classes were -- We had individuals drink  
          to see how they would perform.

          Q.     Did you actually conduct those experiments?

          A.     Yes. Well, I did as an instructor, not when I was a  
          student. The first two days I was a student. After that I  
          became an instructor, and I had a 40-hour instructor course.  
          And then I had an 80-hour instructor course. And I had an  
          additional 40-hour instructor course. I actually had two. One

was put on by the Federal Government and one by -- I'm not sure who put on the second one.

3 Q. So you actually teach others how to administer field  
4 sobriety exercises?

5 A. Right.

6 Q. And other police officers?

7 A. I've taught officers in all 50 states, correct.

8 ...Q. And you said that when you conducted experiments, you  
9 actually had people come in, drink alcohol, and then administer  
10 field sobriety exercises to see how they perform?

11 A. Yeah, I did that. I dosed -- we call it dosing. I  
12 dosed over 400 people over a period time, and I did an  
13 experiment at the police academy for four years, which I  
14 published in one of the articles on field sobriety issues.

15 MR. GOLBURGH: At this time, Judge, I would tender  
16 him as an expert.

17 MR. GOLLESBY: I object, Judge. I would like to voir  
18 dire the witness.

19 THE COURT: Okay, Mr. Gollesby.

20 VOIR DIRE EXAMINATION

21 Q. (By Mr. Gollesby) Have you written an article  
22 regarding the scientific reliability of field sobriety  
23 exercises?

24 A. Yes, one article dealt with that.

25 Q. And what was that article?

1 A. That --

2 Q. Was that prior to 1996, or after 1996?

3 A. Prior to 1996.

4 Q. Prior to 1996. Have you written any articles after  
5 1996?

6 A. No.

7 Q. Have you read the Meador case, familiar with that  
8 case?

9 A. Well, I've read the case, but I'm not -- in other  
10 words, I probably can't read the case like you. There are  
11 certain things I don't understand legally, but I have read the  
12 case.

13 Q. Are you familiar with any of the issues in that case  
14 with regards to the reliability of the exercises or should I  
15 say, regarding scientific reliability of exercises?

16 A. Somewhat. I don't recall off the top of my head, but  
17 I know that was an issue in the case.

18 Q. Let's talk about the somewhat, what you know about  
19 the case; what is that?

20 A. Well, the only somewhat I know about the case is,  
21 there was an issue of whether the tests were scientific and  
22 that they were not scientific.

23 Q. Have you read any literature regarding the scientific  
24 reliability, after 1996, regarding that case or any other  
25 literature?

1           A.    Well, I've read stuff after -- To answer your  
2 question, I've read stuff after '96, but some of it was  
3 pre-dating '96.

4           Q.    Have you read anything on the issue of scientific  
5 reliability after 1996, that case or with regards to any other  
6 article or literature or authority on the issue of scientific  
7 reliability that you're about to be qualified to testify on?

8           ..A.  I have read some articles, yes.

9           Q.    What do you know?  What can you tell us about the  
10 scientific reliability based on those articles that you have  
11 read?  And if you know what articles you have read, please  
12 enunciate them for the record?

13          A.    Well, I can tell you I've read a couple of articles  
14 by Spurgeon Cole.  I believe he's some place in the south.

15          Q.    What do you recall that he wrote based on scientific  
16 reliability of them, and do you have any articles with you or  
17 anything that you can -- that I can have?

18          A.    I don't have anything with me.  I did not bring those  
19 articles with me, no.

20          Q.    Do you recall exactly what was said regarding  
21 scientific reliability of those exercises?

22          A.    Well, I don't recall exactly what he said, but I do  
23 recall some of what he said, yes.  And I've spoken with him  
24 about the article.

25          Q.    Have you actually -- Now you testified earlier that

1 you've actually done training, and you've actually done  
2 studies --

3 A. Yes.

4 Q. -- in the past. Have you actually conducted studies  
5 of your own in correlation with what you read, and actually  
6 gone back into the laboratory and explored that laboratory  
7 setting, based on what you've read? You haven't done that,  
8 have you?

9 A. Well, that's not true. I'm trying to think of how to  
10 answer the question. There are hundreds and hundreds of  
11 articles on field sobriety issues.

12 Q. I'm not talking --

13 A. I have done studies --

14 MR. GOLBURGH: Judge, I'm going to object at this  
15 point. Is Mr. Gollesby's point that the exercises that  
16 were administered are not scientifically reliable?

17 THE COURT: I don't know what his point is. I think  
18 he is trying to decide or help the Court decide whether  
19 the gentleman is qualified as an expert on field sobriety.

20 MR. GOLBURGH: He's testified that he's had hundreds  
21 of hours of training. He was an instructor.

22 THE COURT: I don't want any speaking objections.

23 MR. GOLLESBY: Let me just try to make it clear,  
24 Judge.

25 Q. (By Mr. Gollesby) Based after 1996, and based upon

1 articles that you've read regarding scientific  
2 reliability, have you interpreted that information, gone  
3 back to your laboratory setting and performed what you've  
4 interpreted?

5 A. I have not done any testing since 1996.

6 MR. GOLLESBY: Well, Judge, based upon that, I move  
7 to disqualify him as an expert in the field of field  
8 ..sobriety exercises dealing with the scientific reliability  
9 of them, citing the Meador case.

10 MR. GOLBURGH: I have a question.

11 Q. (By Mr. Golburgh) Mr. Swope, how many people have you  
12 tested in your career, with respect to field sobriety  
13 exercises?

14 A. Thousands.

15 Q. Thousands?

16 A. Thousands.

17 Q. In your career, were you taught to observe those  
18 people while they were performing field sobriety exercises?

19 A. Yes.

20 Q. Were you also taught to formulate an opinion, from  
21 your observations of those people, as to whether or not you  
22 believe they were impaired?

23 A. Yes.

24 Q. Thousands?

25 A. Thousands, yes, or I've instructed them as well, I



1 mean --

2 Q. In other words, you've instructed other officers on  
3 how to administer the exercises and what cues to look for to  
4 determine whether someone's impaired?

5 A. That's correct.

6 MR. GOLBURGH: I would like to tender him as an  
7 expert at this point.

8 MR. GOLLESBY: Judge, I'm going to have to go  
9 side-bar on the issue, but I would just ask one additional  
10 question before we go side-bar.

11 Q. (By Mr. Gollesby) How many people have you actually  
12 observed after 1996, regarding the literature that you've  
13 read, regarding scientific reliability of these exercises,  
14 after 1996?

15 A. Several hundred. That would be in classes that I've  
16 taught. I teach, usually, three field sobriety classes  
17 per year.

18 Q. Now, regarding the date that you interpreted, after  
19 1996, you indicated to the Court just moments ago, "not"; is  
20 the answer different now?

21 A. No. The answer is, not, and I'm just trying to  
22 answer your questions, and yours -- The assumption would be  
23 that I believe that the data I read is correct. I do not  
24 believe that the data that I -- Just because somebody writes an  
25 article doesn't mean that it's correct. I can write an article

1 on the color of this room. that doesn't mean it's right.

2 People have written articles since 1996 I have not  
3 seen any that are reliable

4 MR. GOLLESBY: I'll accept that. Judge, side-bar?

5 (Voir dire examination concluded.)

6 (A side-bar discussion was held:)

7 MR. GOLLESBY: The reason I objected to that, Judge,  
8 is that we have had people come in here who have  
9 administered years and years of field sobriety exercises,  
10 and never elicited the scientific reliability of those  
11 exercises.

12 In the Meador case -- Give me a moment to respond.  
13 Now he is going to testify, qualify as an expert in field  
14 exercises and an expert that's going to scientific nature.  
15 Meador said they're not scientific in nature. Now, that's  
16 why I'm objecting to qualifying him as an expert.

17 Now, past experiences with witnesses testifying to  
18 the reliability of these exercises, you can't always tell  
19 if -- that's commenting on Meador, M-E-A-D-O-R.

20 THE COURT REPORTER: I need you to slow down, please.

21 MR. GOLBURGH: He's a well-trained and experienced  
22 police officer, someone who has administered these tests  
23 thousands of times, and someone who has taught others how  
24 to administer them. I'll elicit the testimony from him.  
25 When he looks at that videotape, he will be able to tell

1 the jury, based on performance, this guy's not impaired.

2 MR. GOLLESBY: That's going a step further than  
3 scientific.

4 MR. GOLBURGH: His cop did the same thing. As a  
5 police officer witness, he can look at the videotape and  
6 he can tell this jury whether my guy's impaired, based on  
7 his performance. His cop did, what's the difference?

8 ... MR. GOLLESBY: He smelled alcohol, he was at the BAT  
9 facility and administered roadsides, he looked at  
10 roadsides. He is going to tell this Court, in an expert  
11 capacity, that this individual is not impaired based on  
12 his actions.

13 MR. GOLBURGH: My hypothetical, these are facts in  
14 evidence. I can't argue a hypothetical with facts not in  
15 evidence.

16 THE COURT REPORTER: I need you to slow down a  
17 little, please.

18 MR. GOLLESBY: Are we attempting to have this expert  
19 elicit an opinion as an expert to the reliability of these  
20 exercises, saying he's not impaired? That's exactly what  
21 he's trying to do, where they're not scientific in nature.

22 MR. GOLBURGH: What he is qualified to do, he is  
23 qualified to take a .10 reading and correlate it and say  
24 how this person should look on a videotape.

25 MR. GOLLESBY: That he can do, take the .10. I've

1 got a question regarding that too.

2 MR. GOLBURGH: If he is qualified to say that, if  
3 this is what indeed he's going to -- is qualified to say  
4 that this kid with a .10, had this many drinks, should  
5 look like this, based on my training and experience. I  
6 don't --

7 MR. LEIFER: Look at the video, he's impaired.

8 THE COURT: Can we agree on a stipulation on what's  
9 going to happen. I agree you can't qualify him as an  
10 expert on these tests because of the argument before. It  
11 goes in your favor, by the way, 99-percent of the time.  
12 Ask Corey.

13 MR. LEIFER: I'll stipulate to the part that he can't  
14 testify as to the scientific reliability of these  
15 exercises, and looking at the video and saying he's not  
16 impaired. I don't mind the blood results coming in.

17 (The side-bar was concluded.)

18 CONTINUED DIRECT EXAMINATION

19 Q. (By Mr. Golburgh) Mr. Swope, you're familiar with the  
20 Intoxilyzer 5000?

21 A. Yes.

22 Q. Do you know how it works?

23 A. Yes.

24 Q. Do you know more than just putting in the breath test  
25 card, pressing the button and having it print out a result,

1 once a person blows?

2 A. Yes.

3 Q. You know, actually, how the internal mechanism of the  
4 machine works?

5 A. Yes.

6 Q. Are you also familiar with the scientific theories  
7 upon which is based?

8 ...A. Yes..

9 Q. Okay. First of all, let's talk about actual machine  
10 itself.

11 We heard some testimony from Susan Lunsford earlier  
12 in the day. She was the maintenance technician involved in  
13 this particular case. And she said that what happens when she  
14 administers a breath test, the subject sits down at the  
15 machine, she presses the start button, it goes through a series  
16 of internal diagnostics, it runs what's called an air-blank,  
17 where it purges the sample chamber of any residual alcohol.  
18 The subject blows, it takes a reading, and it tells the  
19 operator what the breath alcohol is through the LED readout,  
20 and also through the breath test card. The subject blows  
21 another air-blank, cleans out that original sample, the subject  
22 blows again, and again, it takes a reading.

23 Now, the question I have is, how exactly does the  
24 machine go about getting what's considered a valid sample?  
25 What are some of the requirements that must be met?

1           A. Well, the machine needs, actually, several different  
2 things. It needs to have a certain amount of time. The blow  
3 must be a minimum of six seconds. So the time is your first  
4 requirement or one of the requirements.

5           Pressure. You must have enough pressure. You must  
6 be able to blow at least four pounds per square inch. In other  
7 words, to open the breath tube to allow air to pass into the  
8 chamber.

9           Then the machine also has a slope, S-L-O-P-E,  
10 Detector, and that -- Actually, the lay term for it is Mouth  
11 Alcohol Detector. It's looking for a rapid rise and/or rapid  
12 fall in someone's breath alcohol.

13           If someone regurgitates or has a wet burp or  
14 something like that, where alcohol comes through their mouth in  
15 a high concentration, the machine is supposed to pick that up  
16 to let operator know that there is an invalid sample of mouth  
17 alcohol present.

18           Q. Let me ask a question about that. Why, then, does  
19 the Florida Department of Law Enforcement require a 20-minute  
20 observation, if the machine will pick up mouth alcohol?

21           A. Because it doesn't work.

22           Q. What do you mean by that?

23           A. Well, it only works a certain percentage of the time.

24           Q. When wouldn't it?

25           A. Well, it's hard to say when it wouldn't work. I know