

1 IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
2 IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
3 MISDEMEANOR DIVISION

4 STATE OF FLORIDA,

5 Plaintiff.

6 vs.

7 PAULA GRAHAM,

8 Defendant.
9 _____/

CASE NO: 003104-XAM

DIVISION: A

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11 **EXCERPT TRANSCRIPT OF PROCEEDINGS**

13 BEFORE: **HONORABLE JAMES V. DOMINGUEZ**

14 TAKEN AT: Courtroom 17
15 Courthouse Annex
16 Tampa, Florida

17 DATE AND TIME: December 15, 2005
18 8:30 a.m. docket

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20 Electronic Court Reporter

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A P P E A R A N C E S

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REPRESENTING THE STATE:

~~David Harvey~~ ^{Hardy}, Esquire
Dustin Dubose, Esquire
Assistant State Attorney
Office of the State Attorney
County Courthouse Annex
Tampa, Florida 33602

REPRESENTING THE DEFENDANT:

Darren Finebloom, Esquire
Finebloom & Kremez, PA
100 Wallace Avenue, Suite 130
Sarasota, Florida 34237

1 field sobriety tests are consistent with her blood?

2 THE COURT: Wait, wait. No, sir. Your question -- or
3 he was going to be certified or qualified as an expert to
4 give his opinion as to her performance on the field
5 sobriety exercises, not vis-a-vis a breath test.

6 MR. FINEBLOOM: Okay.

7 THE COURT: Okay?

8 MR. FINEBLOOM: Okay.

9 Q In your opinion, how did she do on the field sobriety
10 tests?

11 A I thought she did fine on the exercises.

12 Q Do you believe that she showed sufficient indicators of
13 impairment to be under the influence --

14 THE COURT: Is it your opinion.

15 Q Is it your opinion that she showed sufficient
16 indicators of impairment that you would conclude she was under
17 the influence?

18 A No, she does not.

19 Q Thank you.

20 MR. FINEBLOOM: Nothing else.

21 THE COURT: All right, cross examination?

22 MR. DUBOSE: Yes, Your Honor.

23 CROSS EXAMINATION

24 BY MR. DUBOSE:

25 Q Good morning, Mr. Swope.

1 A Good morning, sir.

2 Q Thank you for coming over today.

3 A Thank you.

4 Q Now just to be clear for the jury, the only time you've
5 actually seen Ms. Graham was here today in court and on that
6 video?

7 A Correct.

8 Q Okay, you've never had any conversations with her
9 before; have you?

10 A No.

11 Q Okay, you weren't the night the field sobrieties were
12 administered; were you?

13 A No, sir.

14 Q Okay, and a moment ago you said that radio frequency
15 may effect the performance of the Intoxilyzer 5000?

16 A Yes.

17 Q Okay, and you said that you couldn't -- actually you
18 told the judge that Hillsborough County does not test for this?

19 A That's correct, not that I've seen.

20 Q You know that they don't or you're not sure?

21 A I know that this machine has not been tested, at least
22 in the records I've looked at.

23 Q So from the records, you can't tell? That's what
24 you're telling the jury, is you that can't tell --

25 A No.

1 Q -- from the records; right?

2 A No.

3 Q Okay.

4 A From the records, I'm saying there's nothing to
5 indicate it has been and I'm assuming the records are right.

6 Q Right, and you're agreeing with me; from those records,
7 you can't make a determination as to whether or not the
8 instrument was tested?

9 A Right.

10 Q Okay, let's talk just a bit -- a minute or two about
11 deep-lung air versus -- I don't know the technical term for it,
12 but we'll upper-lung air; okay?

13 A Okay.

14 Q Is that a fair distinction between upper-lung air and
15 deep-lung air?

16 A Yeah.

17 Q Okay, you say in the first six seconds you're probably
18 not going to get into deep-lung air; is that correct?

19 A Well, I can't say that because it depends on --

20 Q Is that yes or no, Mr. Swope?

21 A I can't get --

22 MR. FINEBLOOM: I would object. Let him answer the
23 question.

24 THE COURT: Ask the question and --

25 MR. DUBOSE: Thank you, Judge. I apologize.

1 THE COURT: -- let him answer. Go ahead, Mr. Swope.

2 A I can't for sure because it depends on how hard the
3 person blows. I would generally agree with you. If they blow
4 softly, they're probably not going to get into deep-lung air; if
5 they blow hard at the start, they're going to get into deep-lung
6 air right away.

7 Q Excellent. Now what are the variables that it takes to
8 measure this sample; time?

9 A Time.

10 Q Slope?

11 A Slope is one.

12 Q What are the other variables?

13 A Pressure.

14 Q Pressure?

15 A Right.

16 Q Now at six seconds, is it accurate that the State of
17 Florida has determined that at six seconds at the adequate time,
18 slope, and pressure, that reading on the Intoxilyzer is
19 reliable? That's what the State of Florida says; is that
20 correct?

21 A Yes.

22 Q Okay, so the Florida Department of Law Enforcement says
23 that that is a valid sample?

24 A Yes.

25 Q You say otherwise?

1 A No, I didn't say that.

2 Q You said --

3 A I never said that.

4 Q You say that it had -- you say that it's not an
5 accurate sample?

6 A I said it's not accurate because after six seconds
7 there's no rule.

8 Q There's no what?

9 A There's no rule after the six seconds.

10 Q Okay. Okay, now regarding deep-lung air, the longer
11 you blow?

12 A Right.

13 Q The longer you blow, the blow gets higher?

14 A Yes.

15 Q That's your testimony; right?

16 A Yes.

17 Q And why is that? Isn't that because the deep-lung air
18 is a more concentrated portion of alcohol to the air?

19 A Yes.

20 Q And in fact, if you get to the deep-lung air, that is
21 the most accurate representation of that individual's current
22 breath alcohol level? The deep-lung air is?

23 A It's more accurate, yes.

24 Q So if they were to blow for 30 seconds and they got
25 every ounce of air out of their lungs and they blew a 0.25 and

1 that would be the most accurate reading? That would be the most
2 accurate -- that would be the most accurate interpretation of
3 their breath alcohol level at the point they finished blowing?

4 A Yes.

5 Q But it's possible that only after six seconds they
6 could have blown a 0.08?

7 A Right, or less.

8 Q When they're actual level would have been a 0.25 had
9 they continued blowing?

10 A Well, again, we don't know. But yeah, --

11 Q Possibly?

12 A -- assuming that they're going up -- sure.

13 Q But it's going up and the more it goes up, the longer
14 they blow, the more reliable the result is; isn't it?

15 A Yes, if --

16 Q The more accurate the result is?

17 A Yes.

18 Q So if someone blows for ten seconds, the reading the
19 machine gives is more accurate than if they only blow for six?

20 A Yes. Again, assuming -- just so you're aware, assuming
21 that there is that concentration of alcohol. In other words,
22 lets say somebody blows an 0.05 or 0.08 or whatever the reading
23 is. That could technically at six seconds be it. I mean, that
24 could -- could be it, theoretically. That might be all they
25 have, but if you're --

1 Q Okay.

2 A -- taking your scenario, they could be --

3 Q Let's take your scenario.

4 A -- double that.

5 Q Let's take your scenario. At six seconds, they blow a
6 0.05.

7 A Right.

8 Q Seven seconds, they blow a 0.05.

9 A Right.

10 Q Ten seconds, they're still at 0.05.

11 A Right.

12 Q That is an accurate reading at ten seconds? That's
13 still an accurate reading?

14 A Yes. Well, we would know at that point, yes.

15 Q You would know at that point that it's not --

16 A Right.

17 Q -- that's as much alcohol as they have in their system?

18 A Right. The machine --

19 Q How --

20 A The machine would basically cut off after probably ten
21 seconds if there was no additional spiking of the reading. In
22 other words, the reading just stops; the machine would probably
23 cut off after that nine seconds.

24 Q Okay, so you're not going to -- there's no detriment to
25 blowing longer? It's actually more accurate; is that correct?

1 A No, that's -- that's not exactly the case. As I
2 indicated, that's -- under the majority of times, that would
3 probably be a scenario. But being the fact that there is no
4 time limit after the six seconds, is what I'm indicating, is
5 that's not a fair representation of what everybody that blows in
6 the machine gets.

7 Q Well, we're not worried everybody; we're just talking
8 about, as we just discussed, the 0.06 -- I mean, six seconds --

9 A Right.

10 Q -- and then the time after that. And you told the jury
11 just now that if you blow a 0.05 at :06 and you're still at 0.05
12 at ten seconds and you're still at a 0.05 at 20 seconds, if you
13 blow that long, that's an accurate representation?

14 A Well, it is but -- but then it isn't. And, you know,
15 I'm trying to not explain to you unless you ask me.

16 Q Well, why -- why is it not?

17 A Well the reason is, is what you want to produce out of
18 the machine is an accurate reading -- and I'm not talking just
19 criminal. I understand, you know, that there's criminal and
20 civil. But the reading that you produce on the card should be
21 the correct reading. It shouldn't be, let's say, "Well, this
22 person blew a 0.10 but they were really a 0.15 or really a
23 0.25," like you suggested.

24 Q Let me stop you, Mr. Swope. You're -- you're a very
25 intelligent man, I understand that. But the question was why

1 wouldn't it be more reliable if the sample were, say, five
2 seconds longer?

3 A Well, because we don't know how much alcohol that
4 person has in them during that period of time.

5 Q Okay.

6 A I mean, there's no way of knowing --

7 Q It's not going to go down, is it?

8 A No, it --

9 Q Would it go down?

10 A No, the only way it would go down is if there's some
11 kind of interference in the machine and that would show the
12 operator if --

13 Q Okay.

14 A It would show the operator something is wrong. That's
15 a possibility, but you could see that by looking at the screen.

16 Q Mr. Swope, you said a minute ago that you've written a
17 couple of articles and actually you used to be a law enforcement
18 officer; correct?

19 A Yes, sir. Absolutely.

20 Q For quite a while?

21 A Quite a while, yes.

22 Q And now you're testifying for the Defense?

23 A Well, in this case. I really don't say it's --

24 Q Today?

25 A -- for the Defense. I testify on issues that I see;

1 correct?

2 Q The question was, are you testifying for the Defense?

3 A Yes.

4 Q You're a smart man and I'm asking pretty

5 straightforward questions; right?

6 A Correct.

7 Q Are they paying you to testify today?

8 A No.

9 Q They're not paying you; you're doing this for free?

10 A They're paying me for my time. Nobody pays me to
11 testify.

12 Q Okay, how much are they paying you today?

13 A I get \$150 per hour, which is portal to portal, or I
14 cap it \$1500 per day, depending on how long I'm here. If I'm
15 more than ten hours --

16 Q How much is this man going to be paying you for
17 testimony -- here testifying here today?

18 MR. FINEBLOOM: I object to that; "this man." What
19 does that mean?

20 MR. DUBOSE: The Counsel, I'm sorry.

21 Q Mr. Finebloom?

22 A Well, it depends on how --

23 MR. FINEBLOOM: I would object and move to strike that.
24 There's no evidence that I pay him money.

25 MR. DUBOSE: I'm asking how --

1 THE COURT: Rephrase the question.

2 Q Okay, how much will you bill Mr. Finebloom if we get
3 out of here at 11:00 and you don't go into the next hour, how
4 much will you bill him?

5 A I will bill him until I get home in Fort Lauderdale.
6 My understanding is there is a 2:00 flight out of here. I'll
7 try to be on that --

8 Q Okay.

9 A -- and probably get back at home at 3:00 and so I will
10 bill until that time. Until I reach home.

11 Q Mr. Swope, just give us an estimate of what you're
12 going to be billing?

13 A Well, my office does that. I told you it's \$150 an
14 hour. I got here this morning, I think, at around 9:00 so I
15 billed from the hotel here until I get home, so you're talking
16 probably seven, eight hours. Something like that.

17 Q Okay, and did -- did you pay for your own flight?

18 A My wife made the flight arrangements but I'm sure that

19 --

20 Q Did Mr. Finebloom pay for your flight or did you?

21 A I'm sure that he'll be billed for the flight.

22 Q Okay, now you said that you have experience with
23 Intoxilyzers?

24 A Sure.

25 Q And you said that from 1984 -- you have to correct me

1 on these dates if I'm wrong -- to 1990, you dealt with them?

2 A In the criminal perspective.

3 Q In the criminal perspective. From 1990 to 1995, you
4 dealt with them as well?

5 A I dealt with them. I maintained the Intoxilyzer at the
6 police academy.

7 Q Okay, and which machine was that that you maintained?

8 A What machine numbers?

9 Q No, what instrument --

10 A Oh, the type? I'm sorry.

11 Q What -- yeah, what type?

12 A 64 and 66 series.

13 Q Of the Intoxilyzer 5000 --

14 A Yes.

15 Q -- or 5000-R?

16 A Well, 66 is the R.

17 Q 66 is the R?

18 A Right.

19 Q Okay.

20 A So I maintained both.

21 Q Okay, what machine was used in this case?

22 A 66, which would be an R model.

23 Q 5000-R?

24 A Yes.

25 Q Okay, and do you know when this machine was actually

1 put online?

2 A No, I didn't see the registration date. I can tell by
3 the serial number when it was produced, but I can't tell you
4 when you actually put it online. You might have had -- you
5 know, the State may have had it in a box for six months --

6 Q Right.

7 A -- is what I'm saying. Mm-hmm, but I can't tell you
8 the exact registration date. I'm sure Beverly could, but --

9 Q Okay, thank you. Now you said that you are a member of
10 an automotive engineer society?

11 A Yes.

12 Q That -- you're not an electrical engineer, though;
13 correct?

14 A No, industrial.

15 Q You're an industrial engineer?

16 A Yes.

17 Q Okay, now Mr. Swope, has a court in Florida or any
18 court for that matter ever found you to be not qualified as an
19 expert?

20 A No.

21 Q No court ever?

22 A No. There's been cases that I didn't testify on
23 certain issues that I wasn't --

24 Q Such as the Intoxilyzer?

25 A -- that I wasn't qualified.

1 Q Such as the Intoxilyzer?

2 A There was one court that I didn't testify on the
3 Intoxilyzer because the judge felt I had to have a card which
4 authorized me in the State to do that. But that was overturned
5 later.

6 Q Okay, now in 1987 -- I think that's the right date, or
7 is this right when you started your own consulting firm?

8 A No, 1990.

9 Q 1990 you started your consulting firm?

10 A Right, right.

11 Q And part of your consulting firm, you do accident
12 reconstruction?

13 A Yes.

14 Q And you do mostly that; 90 percent?

15 A Right.

16 Q Your bread and butter is accident construction?

17 A Yes.

18 Q And about ten percent of that you do -- you testify
19 regarding Intoxilyzers issues or DUI issues?

20 A Yes, DUI issues.

21 Q Okay, now a moment ago I asked you -- we got into a
22 little bit of a semantics debate about whether or not you're
23 testifying for the Defense, whether or not he's paying you,
24 things like that; do you have any ill-will against the State?

25 A No.

1 Q You've written an article that says that you're -- that
2 it's okay to lie if you're the State?

3 A Well, there's a reason I wrote that.

4 Q The question was, have you written it?

5 A Pardon?

6 Q Have you ever written it? Did you write that article.

7 A Yeah, but it wasn't ill-will. It was something totally
8 different.

9 Q I just asked if you wrote it?

10 A Yes.

11 Q Is it a two-part article?

12 A Yes.

13 Q Okay.

14 A And there's a reason I wrote that article.

15 Q And you said a minute ago that you attend -- or
16 actually for the most part give private seminars?

17 A No, I lecture at private seminars. I've never given
18 them.

19 Q Sorry, you lecture at private seminars?

20 A Right.

21 Q And what is the nature, what is the subject matter of
22 what you lecture?

23 A Well, primarily I lecture for an hour, generally, to an
24 hour and a half at each seminar and that's usually broken up
25 between vehicular accident reconstruction and DUI. It could be

1 either breath testing, it could be Intoxilyzer, or both of them.

2 Q Okay, and you're paid for these?

3 A No, all my money -- all my money goes to whoever I let
4 it go to; some kind of charity, cause, whatever. I do get
5 travel expenses.

6 Q Okay.

7 A But I take no money from the seminar.

8 Q Okay, so who attends these seminars; do you know?

9 A By name? No.

10 Q Have you ever had any conversations with the guys who
11 are sitting outside after you get done talking?

12 A Some. I've certainly had prosecutors, I've had a
13 couple of judges attend, I've had police officers, I've had
14 defense attorneys. Pretty much the gambit of attorneys.

15 Q Right, understandable. You ever exchange business
16 cards with these gentlemen?

17 A I'm sure, if they ask at times, I do.

18 Q Do you ever --

19 A Usually I don't have them with me.

20 Q Do you ever get any phone calls, do you ever generate
21 any business this way, does anyone ever call you up to testify
22 based on them seeing you speak at one of these seminars?

23 A I can't say that I haven't. I don't know, but I'm
24 certain that people do get my name from seminars and have seen
25 me lecture. And some of them have 500 people so I'm sure some

1 of it comes from that, sure.

2 Q Okay, and do you know how long in this case Ms. Graham
3 actually blew into the machine?

4 A No.

5 Q Okay, now since you've had your firm and you've been
6 out of government work, have you ever testified that the
7 Intoxilyzer 5000-R is a reliable instrument?

8 A No, not in a criminal case. No.

9 Q Would it be true that you think that all breath testing
10 is unreliable?

11 A No, that's not true.

12 Q It's not true?

13 A No, it's not true.

14 Q Would it be true that you think that all Intoxilyzer
15 5000-R's are unreliable?

16 A No, that's not true either.

17 Q Okay, but you've always testified whenever you've been
18 asked in court that you think that the 5000-R is unreliable?

19 A Yes, that's a different issue.

20 Q Okay.

21 MR. DUBOSE: Nothing further for this witness.

22 A Thank you, sir.

23 THE COURT: Cross -- redirect?

24 MR. FINEBLOOM: Just a couple of questions.

25 THE COURT: Okay.