

1 IN THE COUNTY COURT OF THE TWELFTH JUDICIAL
2 CIRCUIT OF FLORIDA IN AND FOR MANATEE COUNTY
3

4 STATE OF FLORIDA,
5 Plaintiff,

6 vs

CASE NO. 98-1619M

7 GARY RAY HATFIELD,

8 Defendant.
9
10

11 Transcript of excerpt of proceedings and
12 testimony electronically recorded in the above-entitled
13 cause before the Honorable Marc B. Gilner, County
14 Judge, at the Manatee County Courthouse, Bradenton,
15 Florida, on October 19, 1998.
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20 APPEARANCES

21 PAUL GHEZZI, ESQUIRE
22 Assistant State Attorney

23 NEIL G. TAYLOR, ESQUIRE
24 Attorney for the Defendant
25

ORIGINAL

1 EXCERPT OF PROCEEDINGS

2
3 RICK SWOPE

4 was called as a witness by the Defense and, having
5 been duly sworn, was examined and testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. TAYLOR:

9 Q Sir, would you tell us your full name and
10 spell your last name for the record?

11 A My name is Rick Swope. S-w-o-p-e.

12 Q Mr. Swope, what do you do for a living?

13 A I do, primarily, accident reconstruction.
14 But I also do some consulting and teaching and
15 experimentation with the Intoxilyzer 5000. All three
16 different models of the machine.

17 Q Let me take you, if I may, rather quickly,
18 through your educational background. When you
19 graduated high school, sir, where did you go?

20 A I went into the military. I was a military
21 police officer for three years with the traffic
22 division.

23 Q Subsequent to the military did you pursue
24 higher education?

25 A Yes.

1 Q Where?

2 A Well, I obtained a Bachelor's degree from
3 St. Thomas University in Miami, in Criminal Justice.
4 And I have a Masters of Science degree from University
5 of Miami in technology and engineering.

6 Q Did you then enter any particular profession?

7 A Yes.

8 Q What?

9 A Police work.

10 Q Where?

11 A I was with the Monroe City Police Department
12 in Monroe, Michigan. And I was also with the, the last
13 six years of my career, I was with the Broward
14 Sheriff's Office in Ft. Lauderdale. Four of those six
15 years I was the administrator of the DUI task force and
16 traffic homicide units.

17 Q Would you briefly, for the benefit of Judge
18 Gilner, give us a synopsis of your duties and
19 responsibilities as the individual in charge of that
20 detail for the Broward County Sheriff's Department?

21 A Well, primarily, obviously, it was the
22 budgeting of the unit, the administration of all the
23 rules and regulations. Initially it was HRS that ran
24 the breath program then it was FDLE. It involved
25 attending meetings in the state with the new breath

1 testing rules that began to come into the state in 1984
2 and '85, involving breath testing machines.

3 Broward County was one of the sites selected
4 for the use of the Intoxilyzer 5000 before it was
5 actually approved. So, at that time, myself and
6 another person in the unit did the experimentations
7 with the machine. We did tests versus that machine and
8 others.

9 Q By way, the Intoxilyzer 5000, is that the
10 machine that was used in this case?

11 A Right, that's correct.

12 Q All right, sir. Go ahead.

13 A I also became, in 1984, I became an
14 instructor for the State of Florida and I also began to
15 teach breath and field sobriety exercises for the
16 Federal Government, the National Highway Traffic Safety
17 Administration.

18 I was selected in 1987 to begin writing
19 training outlines for the state and for police
20 academies throughout the State of Florida, including
21 Dade County, Broward, Palm Beach.

22 I also submitted outlines to the state which
23 were used. In other words, outlines were submitted and
24 they may have used, the State of Florida uses maybe
25 part of the outline. There were like several people

1 that wrote them. So, in other words, part of my
2 outlines were used for the state and some weren't,
3 depending on what it was.

4 And I was a certified breath operator and
5 maintenance technician. I went to the factory, this
6 was all during police training, and began to do
7 experimentations with the machine in 1989. And I've
8 been doing quite a few experimentations ever since.
9 Currently I'm doing work at FIU.

10 Q Okay. What were the circumstances under
11 which you left the Broward County Sheriff's Office?

12 A Well, I just wanted to go into private
13 business. I've been doing it as a police officer for
14 15 years and I actually went into business as a
15 reconstructionist. But, because of my background in
16 breath testing, I began to get calls at this type of
17 review and I did a lot of experiments and I wrote and
18 published several articles and worked with and taught
19 around the country. I taught at Harvard, Emory. I've
20 been pretty much all over. So, I that's how I got to
21 be known, I guess.

22 Q Do you continue to hold certification as a
23 police officer?

24 A No. My certification ran out four years
25 after I left the police department. That would be in

1 1994. My breath certification permits, I let, I
2 voluntarily let run out in 1995 because - -

3 Q Why?

4 A Well, there was no need, nobody, no police
5 officers brought them to my house for processing, so .
6 . . The permit only allows for criminal prosecutions
7 and I had no need to do that anymore. I didn't need
8 that permit. It didn't really serve my purpose anyway.

9 Q Have you in the past engaged in consulting
10 activities to various law enforcement departments in
11 different states other than Florida?

12 A Sure.

13 Q Would you give the judge an idea of who, what
14 departments, what states?

15 A Well, I've consulted, either myself or with
16 other people in my field, as far as teaching officers
17 and going over policies and procedures in other states.
18 I've done it in Washington, Georgia, Michigan, Ohio,
19 Virginia, the Carolina's, Florida, obviously. So, I've
20 been around. It depends on who has the Intoxilyzer
21 5000 machine.

22 Q Let me ask you about some of your previous
23 and current clients. Have you done work for the United
24 States Justice Department?

25 A Yes, I do a lot of work for them.

1 Q Are you engaged and work on their behalf now?

2 A Yes.

3 Q How about for the state attorney's offices
4 across the State of Florida?

5 A Yes. I have done, consulted. Primarily the
6 one I worked for was Broward because I'm actually in
7 that county, so I tended to do more work there than I
8 did other places.

9 Q Any other districts?

10 A Well, there were other districts - -

11 Q Counties?

12 A Yes. Mainly I do defense work for those
13 agencies, meaning that officers are occasionally sued
14 for improper arrests, so they consult with me and use
15 me as a witness to either say the arrest was proper or
16 not, depending on the type of situation, policies and
17 procedures and those types of things.

18 Q Are you paid by the prosecution or by law
19 enforcement when called upon to render your services?

20 A Yes. I bill them just like I do anyone else.

21 Q Is your testimony in any way dependent upon
22 that salary that you're paid?

23 A No.

24 Q Let me ask you about any special projects
25 that you may currently be involved in with respect to

1 the Intoxilyzer 5000. Are there any?

2 A Well, besides my own, I mean, I work on the
3 machines all the time but I am working on one project
4 now, yes.

5 Q Would you tell the judge what it is?

6 A Florida International University received a
7 grant, Federal grant, to do testing on Intoxilyzer
8 machines and my job is to, they pay me for the service
9 and my job is to contractionally keep the machines in
10 what's called scientific operating condition, meaning
11 that the machines that we use for, the Intoxilyzer
12 machines are used for experiments where people write
13 articles and do experimentations and the machines have
14 to be kept up to what we call scientific level, meaning
15 they have to be accurate and reliable. So, it's my job
16 to keep the machines up and repair them if necessary,
17 turn them back to the factory for repairs. We do blow
18 them up, I mean, we do blow the machines up quite
19 often, so, because of that I have to keep them up to
20 date.

21 MR. TAYLOR: Your Honor, at this point I
22 would tender him as an expert on blood/breath
23 alcohol, the Intoxilyzer 5000.

24 THE COURT: Sure, the machines, yeah.

25 MR. GHEZZI: Judge, I'd object to his

1 testimony. He's testified that he has prepared
2 numerous reports, articles. The State hasn't been
3 provided with any of them. The motion itself is
4 insufficient. It didn't put the State on notice
5 as to what exactly was wrong with the Intoxilyzer.
6 If he's going to testify to something specific
7 being wrong, I think that should be included in
8 the motion because how else is the State supposed
9 to prepare to defend against it.

10 His motion was just very general. It's
11 something that needs to be looked into, basically.

12 THE COURT: I'm going to overrule your
13 objection. If you feel the need to have the
14 hearing continued because you need to do more work
15 or something, I'll look into that when the time
16 comes. But, meanwhile, the man's here. Let's go
17 ahead with it.

18 Go ahead, Mr. Taylor.

19 MR. TAYLOR: Thank you, Judge.

20 Q (By Mr. Taylor) Mr. Swope, in preparation
21 for your testimony here today, have you undertaken any
22 efforts?

23 A Yes.

24 Q What is that? Had an opportunity to review
25 any documentation?

1 MR. GHEZZI: Objection, Your Honor. He
2 tendered this witness as an expert. I'd object.
3 I'd like to have a chance to cross examine him on
4 his qualifications.

5 THE COURT: Well, very briefly. I mean, do
6 you think that you're going to come up with
7 something that he doesn't know anything about the
8 machine?

9 MR. GHEZZI: I don't know but . . .

10 THE COURT: Okay.

11
12 VOIR DIRE EXAMINATION

13 BY MR. GHEZZI:

14 Q You testified that you had testified for the
15 law enforcement in the state in the past, correct?

16 A Yes, sir.

17 Q When was the last time?

18 A For the state, probably about a year and a
19 half ago.

20 THE COURT: Now, let's not spend a lot of
21 time on cross exam on bias and so on. This is in
22 regard to his qualifications as an expert to give
23 an opinion.

24 Q (By Mr. Ghezzi) Are you currently, you said
25 you hadn't been hired by the state for a year and a

1 half. Why is that?

2 A No, I have not said I was not hired. You
3 asked me the last time I testified. I've been hired as
4 recently as two months ago by the Department of Justice
5 to defend a Seminole police officer, which is a
6 reservation, as you're aware of, Indian reservation.

7 Q Anything to do with the Intoxilyzer?

8 A In that case, I don't think so. The
9 Intoxilyzer one was I'm working on a case now for the
10 City of Miami where an officer was drunk on duty,
11 supposedly, I shouldn't say that, but, allegedly he was
12 and wrecked his police car on duty. There was a breath
13 issue and I'm testifying in a civil case for them about
14 the breath.

15 Q The officer hired you himself?

16 A No, the city did. The city is being sued for
17 whatever, I don't know all the details.

18 Q Have you ever failed to be qualified as an
19 expert in any other counties on an Intoxilyzer matter?

20 A Not yet. I don't recall. There might be
21 times when I come in and testify and maybe I don't
22 have, the judge will rule that the motion we're there
23 for may not be permissible or something like that but
24 not when I got on the stand, that I'm aware of.

25 Q Have you ever been disqualified as an expert

1 in any case?

2 A No. No. Not yet.

3 Q There have been times when you haven't been
4 allowed to testify as an expert?

5 A No, not after I've taken the stand. There
6 are issues before, in other words, whatever the
7 legalese is, so to speak, that I don't testify because
8 what I have to testify is not pertinent to the case.

9 Q Have you ever, based on your qualifications,
10 though, ever been not allowed to testify on a case or
11 disqualified or not qualified as an expert?

12 MR. TAYLOR: Asked and answered.

13 THE COURT: I think his answer was no.

14 A (By Witness) No.

15 THE COURT: Go ahead, Mr. Taylor.

17 DIRECT EXAMINATION CONTINUED

18 BY MR. TAYLOR:

19 Q Can you approximate how many times you've
20 been qualified and recognized as an expert witness in
21 this specific area?

22 A Over 600.

23 Q Have you in fact been recognized previously
24 as an expert witness in Manatee County?

25 A Yes.

1 Q Have you had the opportunity to review the
2 discovery that was provided to me by Mr. Ghezzi of the
3 Manatee County State Attorney's Office in this case?

4 A Yes, sir, I have.

5 Q Included in that review did you peruse the
6 printout and all of the documents relative to the
7 Intoxilyzer 5000?

8 A Yes.

9 Q As well as the breath test report?

10 A Yes, sir.

11 Q Did you evaluate them?

12 A Yes, sir.

13 Q Have you had an opportunity today to listen
14 to Deputy McClain's testimony?

15 A Yes, sir, I did.

16 Q Would you tell Judge Gilner what
17 regurgitation is?

18 A Well, regurgitation would just be, I call it
19 a wet burp, meaning somebody maybe has something come
20 back up in their throat. It could be just a regular
21 burp or it could be somebody who almost throws up but
22 doesn't and they swallow it back down. It's kind of
23 gross, but . . . That's really what it encompasses.
24 It also encompasses if alcohol is in their system it
25 amounts to a higher concentration in their mouth.

1 Q What's the significance of that?

2 A Well, the significance of it is that it can
3 affect the reading, especially if the slope detector or
4 the mouth alcohol detector does not pick it up. That's
5 the main purpose of the observation period. Also, the
6 operator might get a little bit of knowledge if
7 there's, if something's wrong with the reading. So,
8 there's actually different ways to look at that.

9 Q Is there in fact, as part of the Florida
10 Administrative Code of Rules promulgated by the FDLE,
11 Florida Department of Law Enforcement, that commends
12 the 20 minute observation period for that purpose?

13 A Yes.

14 Q You're familiar with it?

15 A Yes, I am.

16 Q Do you recall, did you have an opportunity to
17 review in this case, Mr. Swope, the Manatee County
18 Sheriff's Office breath test report?

19 A Yes, I did.

20 Q Does that form acknowledge the 20 minute
21 observation period and its necessity?

22 A Right, it does.

23 Q In one or two different places?

24 A In two different places.

25 Q Specifically, could you tell us?

1 A Well, specifically it does on page one of
2 two. There are two pages. Page one at the bottom,
3 number three. I think the officer already gave the
4 cites. Also on the second page which is number five
5 and six. Actually, there, actually four, five and six
6 really encompass the fact did the guy leave his
7 observation or whatever.

8 Q Mr. Swope, in this case, did the deputy,
9 specifically Deputy McClain, follow those requirements?

10 A Well, not necessarily, no.

11 Q Why?

12 A Well, the form encompasses the fact that the
13 officer should keep them totally in sight and, I don't
14 know, I saw the diagram that the officer put and I
15 didn't know how he was standing or how he may have been
16 standing but, the fact is, the form does provide for a
17 notation that if he's out of sight or he goes to the
18 restroom or something to explain that and the officer
19 could have started the initial observation, and since
20 he didn't know what time it was, I mean, if it was the
21 first four or five minutes, it's no problem. If it's
22 the last couple of minutes the officer probably would
23 have just gave the test. But he didn't really follow
24 the 20 minute observation the way it's supposed to be
25 followed.

1 Q All right. In this particular case, would
2 you tell Judge Gilner, Mr. Swope, what, if any,
3 indications of regurgitation were present?

4 A Well, actually the card is the . . .

5 Q Referring to Defense Exhibit Four?

6 A I just have my copy. I don't know what Four
7 is.

8 MR. TAYLOR: May I, Your Honor?

9 THE COURT: Well, you're going to check the
10 number? Yes, it's the breath test card, I'll call
11 it.

12 A (By Witness) Yeah, Number Four. In just
13 looking at the card initially, my first response in
14 seeing the card when I got it in discovery was that the
15 possibility of mouth alcohol existed because of the
16 fact that there were more than two readings. And the
17 fact that the readings fluctuated quite a bit. That's
18 an indication.

19 Q Let's break that down for a minute. Is there
20 a FDLE rule also in the Florida Administrative Code
21 that directs itself to what must be done in the event
22 there are two readings that are not within a certain
23 percentage of one another?

24 A Right. It does.

25 Q What does that rule command?

1 A Well, the rule commands that if the two
2 readings do not meet within a .020 of each other then a
3 third reading will be given. Technically you can keep
4 going, you know, if the readings are, stay apart. I've
5 seen as many as 13 reading before they had two that
6 were .020.

7 Q Is there anything in addition to the fact
8 that in this case - - How many readings were taken in
9 this case?

10 A Three.

11 Q Were the first two beyond that required
12 window period of .20?

13 A Yes.

14 Q Greater discrepancies?

15 A Right.

16 Q Requiring a third test?

17 A Yes.

18 Q Is there anything in addition to the fact
19 that there were three tests required that, to you, as
20 an indicator of the presence of regurgitation and mouth
21 alcohol?

22 A Yes.

23 Q What?

24 A Well, when you say regurgitation and mouth
25 alcohol, I also like to just add that it could be a

1 problem also.

2 Q Uh huh?

3 A Something with the machine. But that's the
4 greatest item that would come to mind is regurgitation
5 or mouth alcohol. And that's based on the fact that
6 the first reading is .237. The second reading, now, if
7 there is mouth alcohol, you generally will have a large
8 discrepancy between the first and the second reading.
9 In this case it goes from a .23 to a .26.

10 Q So there is a large discrepancy?

11 A Right. Now, at the third reading, and
12 there's a couple of minutes that passes between each
13 one, the mouth alcohol should dissipate, you know,
14 during that period unless there's subsequent
15 regurgitation.

16 What happens is, now you have a .22. So, in
17 other words, you have what's called, and I'm not
18 speaking to say this is a low read, I'm just talking
19 scientifically, that you have a low one, you have high
20 one and now you have a low one again. And that
21 shouldn't happen unless you have mouth alcohol or some
22 type of interferant, or a mechanical or software
23 problem.

24 So, that's unusual, so to speak.

25 Q Tell us, Mr. Swope, when, in relation to the

1 breath sample being submitted by Mr. Hatfield is the
2 actual card printed out by the machine?

3 A Well, the card would be printed out after
4 everything is finished. In other words, after the
5 third sample is done the machine will then air blank
6 itself and then the card, there's a pause, a slight
7 pause in the machine software and then the card will
8 print out in its entirety from top to bottom and will
9 spit out.

10 Q Can the presence of mouth alcohol have an
11 impact on the accuracy of the reading?

12 A Absolutely.

13 Q Do you believe it did in this instance?

14 A Yes.

15 Q I want to ask you, Mr. Swope, if you would
16 tell Judge Gilner, in addition to the .02 difference
17 between the first reading and the second reading, or
18 the .20 difference, which is it?

19 A .020.

20 MR. TAYLOR: .02. Sorry, Judge.

21 THE COURT: Let's not make it too tough on
22 them.

23 MR. TAYLOR: I got excited, Your Honor.

24 THE COURT: There'd never be a discrepancy if
25 it was .20. Maybe you've seen it before.

1 Q (By Mr. Taylor) Mr. Swope, tell Judge
2 Gilner, in addition to that discrepancy that required a
3 third test, what was the first indicator to you that
4 there may be a problem here?

5 A The date.

6 Q Why?

7 A Well, because there's only two things that
8 can affect the date. That's either it's being changed
9 manually or it's a software problem. That's the only
10 two things. There can be nothing else. Everything
11 that prints out on this card is done through the same
12 computer check, done through the same relay system.

13 So, one or the other. Either somebody got in
14 there and changed it, which, I certainly have no reason
15 to believe that the officer did that, or, it's a
16 software problem. There is no other thing.

17 Q What about this testimony that we frequently
18 here that these machines, specifically this type, the
19 Intoxilyzer 5000, is self correcting?

20 A Well, the only thing it can self correct
21 itself on, the machine itself, would be, just like
22 booting up a computer. Sometimes your computer locks
23 up on you or freezes or something happens. You shut
24 the computer down and you re-boot and it comes back up
25 correct. But that still indicates that there's some

1 kind of problem. It could be a virus, it could be
2 maybe the operator did something. It's the same type
3 of system.

4 Q Let me move on, if I can. I want to ask you
5 about the qualifications of an agency inspector. Would
6 Mr. Frank Shoemaker qualify for - -

7 MR. GHEZZI: I'd object to his opinion. He
8 hasn't been qualified as an expert in this area, I
9 don't think, Judge.

10 THE COURT: Sustained.

11 MR. TAYLOR: Precisely.

12 THE COURT: What would he be basing this on?

13 MR. TAYLOR: On the FDLE rules, Your Honor,
14 implemented through the Florida Administrative
15 Code.

16 THE COURT: He's going to give his opinion
17 about whether the guy that does the stuff is
18 qualified to do it or not?

19 MR. TAYLOR: No, he's going to give his,
20 well, in one aspect, yes, as it relates to Justice
21 and as it relates to Justice's approval of
22 Shoemaker. But, more than anything he's going to
23 point out for the court the requirements before
24 one can be an agency inspector such as Mr.
25 Shoemaker, or, a regional inspector such as Mr.

1 Justice.

2 THE COURT: Well, he can testify to that.
3 But as far as whether he thinks Frank Shoemaker
4 does that, qualifies or not, leave that to me. I
5 don't think it takes an certain expert to decide
6 whether somebody's properly certified.

7 MR. TAYLOR: Agreed. And I think the court,
8 as I go, will see the distinction that I'm making.

9 Q (By Mr. Taylor) Tell us what documentation
10 an agency inspector receives? Certifications, if you
11 will.

12 A Well, an agency inspector will receive
13 certification from the State to be allowed to approve
14 and perform maintenance, some repairs on certain types
15 of Intoxilyzers or machines in their use. And that
16 would come from FDLE.

17 Q A certification card and a permit?

18 A Right. Well, they can have one or both, it
19 depends. If they've had it for several years, they'd
20 probably only have had one card. Now they would have
21 two.

22 Q Would they also, assuming they're qualified,
23 have a maintenance permit?

24 A Yes. Again, depending on what they can do.
25 But most of them would, yes.

1 Q These are representative of what, these
2 permits?

3 A Well, they're just representative that they
4 can do that type of work or that type of, they can give
5 breath tests, they can repair the machines, they can do
6 certain kinds of approvals on them, those types of
7 things.

8 Q Who's the issuing agency?

9 A That would be FDLE.

10 Q Who examines, if anyone, and approves an
11 individual to be an agency inspector. In other words,
12 who would examine and approve Mr. Shoemaker to qualify
13 to do this for the Manatee County Sheriff's Office?

14 A That would be a regional inspector.

15 Q Do you know who the regional inspector is for
16 this region?

17 A Well, I did at that time. I don't know today
18 who it is.

19 Q Who was it at that time?

20 A That was Bernard Justice.

21 MR. GHEZZI: Judge, I'm going to object to
22 any further testimony in this area. I did a
23 motion to strike this which is (inaudible) this
24 whole - - Buck Justice - - there's a - - to the
25 State's knowledge there's absolutely no issue here

1 unless they - - and they didn't indicate exactly
2 what issue in their motion they were looking to
3 litigate here in this hearing. I would object to
4 any testimony at all regarding this particular
5 issue.

6 THE COURT: Based on what?

7 MR. GHEZZI: Well, I did my motion to strike,
8 Judge. The State wasn't noticed of what - - I
9 mean - -

10 THE COURT: You didn't get the supplement in
11 time or something?

12 MR. GHEZZI: Well, no, I think I got it a
13 couple of weeks ago. I didn't see it until
14 recently because my secretary was out of town and
15 my other secretary just put it in the file.

16 MR. TAYLOR: It was mailed in July, Your
17 Honor.

18 THE COURT: It looks like issue is raised
19 back in, well, the certificate of service is
20 September 16th.

21 MR. GHEZZI: Well, the motion pertains to
22 legal conclusions which aren't supported by
23 specific reasons or allegations of fact. It just
24 says, you know, I don't know the exact wording of
25 the motion or supplement was.