

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

THE STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 98-1619 T

GARY HATFIELD,

Defendant.

Transcript prepared from a tape recording of
proceedings reported in the above-entitled cause before the
Honorable Marc Gilner, County Judge, and a jury at the
Manatee County Courthouse, Bradenton, Florida, on December
8, 1998 and December 9, 1998.

EXERPT

APPEARANCES

PAUL GHEZZI, ESQUIRE
and DONALD HARTERY, ESQUIRE
Assistant State Attorney
On behalf of the Plaintiff

NEIL G. TAYLOR, ESQUIRE
and WILLIAM S. GALVANO, ESQUIRE
Grimes, Goebel, Grimes, Hawkins & Gladfelter, P.A.
On behalf of the Defendant

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1 die, probably?

2 A Yes. Could.

3 MR. HARTERY: I don't have any other
4 questions.

5 THE COURT: All right.

6 MR. TAYLOR: No further questions.

7 THE COURT: All right. Want to make sure,
8 you're all done, is that correct?

9 MR. TAYLOR: Yes.

10 THE COURT: All right. Mr. Taylor, may Mr.
11 Chambers be excused from his subpoena?

12 MR. TAYLOR: Yes, he may.

13 THE COURT: You're free to go, sir. Thank
14 you. Bye bye.

15 MR. TAYLOR: Your Honor, at this time, the
16 defense would call Mr. Rick Swope.

17 THE COURT: All right. Rick Swope, please.

18 (THEREUPON, THE WITNESS WAS SWORN.)

19

20

RICK SWOPE

21

was called as a witness on behalf of the Defendant

22

and having been duly sworn, testified as follows:

23

DIRECT EXAMINATION

24

BY MR. TAYLOR:

25

Q Would you state your full name and, for the

1 record, please spell your last name?

2 A My name is Rick Swope. S-W-O-P-E.

3 Q Mr. Swope, what do you currently -- how are
4 you currently employed?

5 A I have my own company and have an office
6 here -- I have an office in Ft. Lauderdale and I have one
7 in Atlanta. I do primarily accident reconstruction. I
8 also do some work involving the breath testing devices,
9 primarily the Intoxilyzer. I consult in some D.U.I. cases,
10 and I do some teaching and writing involving the
11 Intoxilyzer machine, and I have done training involving the
12 machine and also field sobriety exercises.

13 Q All right. Let me, if you will, take you
14 through your education and training and experience that you
15 have had to enable you to obtain the position you now hold.
16 Would you tell us about your education?

17 A Yes. I graduated from high school in 1974. I
18 was a police officer for 15 years. The last six years, I
19 was with the Broward County Sheriff's Office in Ft.
20 Lauderdale. Four of those six years, I was the
21 administrative coordinator of the traffic homicide D.U.I.
22 task force unit.

23 I was trained in the State of Florida. Also,
24 I was initially trained in Michigan, but I was trained in
25 the State of Florida as a breath test operator.

1 I also became an instructor for the National
2 Highway Traffic Safety Administration to teach field
3 sobriety exercises.

4 Q Let me interrupt you for just a moment. Tell
5 the ladies and gentlemen of the jury what the significance
6 of the National Highway Traffic and Safety Administration
7 is.

8 A That's a part of the Federal government,
9 Department of Transportation. When you become an
10 instructor for them, you're actually, at that time -- I
11 don't know how it is today, but at that time, you were
12 actually selected and you went through training.

13 I think at that time it was 160 hours
14 originally because you had to go through different courses
15 to become an instructor, and then the field sobriety
16 courses were laid out differently at that time. And then
17 you were allowed to teach or sign off on certificates
18 anywhere in the country versus rather than just in the
19 State of Florida. So I actually have taught officers in
20 all 50 states.

21 Q And they, the National Highway Traffic Safety
22 Administration, promulgates, as part of the Federal
23 government, guidelines that are utilized by various police
24 departments and agencies around the country?

25 A That's correct.

1 Q Okay. They also do studies in depth with
2 unlimited Federal funds regarding alcohol and alcohol
3 related circumstances?

4 A Yes. Yes, sir.

5 Q Now, before I let you go, let's go back to
6 your education for a minute. You said you graduated high
7 school when?

8 A 1974.

9 Q Okay. Did you have any education past high
10 school?

11 A Yes.

12 Q What?

13 A Besides the police training and education, I
14 have a bachelors degree in criminal justice from St. Thomas
15 University in Miami. I have a masters of science degree in
16 technology and engineering from the University of Miami.

17 Q All right. You entered the police force after
18 serving in the military?

19 A Well, I served in the military police for
20 three years under the United States Army.

21 Q How were you discharged?

22 A I was discharged honorably in 1977.

23 Q All right. And then after you were
24 discharged, what profession did you go into?

25 A I went straight into police work.

1 Q And where did you start?

2 A I started in the State Police Department in
3 lower Michigan in 1978, and I worked there until 1984. I
4 took three days off and started with the Broward County
5 Sheriff's Department in Ft. Lauderdale.

6 Q How long were you with the Broward County
7 Sheriff's Department?

8 A Six years.

9 Q All right. During the course of those six
10 years, did you reach any particular position where you
11 specialized and had duties and responsibilities for alcohol
12 related incidents?

13 A Yes.

14 Q Would you tell the ladies and gentlemen of the
15 jury what that was?

16 A Well, after the initial training and -- I
17 became an instructor for the State of Florida also, for the
18 Florida Department of Law Enforcement, and I taught at the
19 police academy for approximately ten years.

20 I taught there actually four years after I
21 left police work, and I became the administrative
22 coordinator -- at that time, there was a position, usually
23 it's a sergeant or a lieutenant's position, depending on
24 the department, but our department at the time called it
25 administrative coordinator, and I was responsible for the

1 budgeting and training of the unit, hiring people and
2 firing them, if necessary, or at least requesting they be
3 fired or moved to another unit. I maintained the breath
4 machines.

5 Of course, I had individuals helping me, but I
6 maintained the breath machines and did the breath testing,
7 set up the breath alcohol testing sites, pretty much
8 everything.

9 Q Now, we had a deputy in here who earlier
10 testified that, while he was qualified to administer a test
11 on a machine, he was not qualified to understand the
12 internal workings of the machine, that was more for the
13 experts. Are you, in fact, one of those gentlemen that
14 understands the internal workings of the machine?

15 A Pretty much, yes.

16 Q All right. Now, when did you leave the
17 Broward County Sheriff's Department?

18 A I left in July of 1990 to enter private
19 business.

20 Q All right. At the time you qualified for your
21 position in training with the Broward County Sheriff's
22 Department, did you go through the police academy?

23 A Sure.

24 Q All right. And subsequent, after police
25 academy, did you have any special individualized training?

1 I know you mentioned the training you had with the National
2 Transportation and Safety Administration.

3 Did you have any other training seminars,
4 things of that nature, in the administration of the
5 Breathalyzer and in the detection of D.U.I. related crimes?

6 A Yes.

7 Q Any idea of approximately how many more hours
8 of instruction beyond that which you would have received
9 normally as part of your police response -- you're academy
10 duties?

11 A Well, it's hard saying. There obviously was a
12 couple hundred hours, initially, of training, but then when
13 you start teaching it, I consider that training, too. Even
14 though you're a teacher, you still learn something every
15 class.

16 Q Um hum.

17 A So like I said, I taught in that area for ten
18 years.

19 Q Okay.

20 A So it's quite a few hours.

21 Q Did you hold, when you were with the Sheriff's
22 Department, certifications for the administration of breath
23 tests and the inspection and maintenance of the machines?

24 A Yes.

25 Q Okay. And those certifications were issued by

1 the State of Florida?

2 [REDACTED]

3 Q All right, sir. And you needed to reach, of
4 course, certain levels of proficiency to obtain them?

5 A Right.

6 Q Now, you have told us that you've done a
7 considerable amount of teaching?

8 A Yes.

9 Q Give us an idea of the types of places, when
10 you say teaching of both lectures as well as hands-on
11 demonstrations?

12 A That's correct.

13 Q Okay. Give us, ladies and gentlemen of the
14 jury, an example of the types of audience that you would
15 have instructed. For example, ever present any instruction
16 to law enforcement agencies?

17 A Yes.

18 Q Can you say how many, who they were, can you
19 give us an example?

20 A It's been, as far as the number of officers,
21 certainly in the hundreds. I've taught, as I indicated,
22 officers in all 50 states. That doesn't mean I have been
23 to each state, but a lot of times the officers will come to
24 you, to where the seminar is being held.

25 I've also taught, you know, prosecutors,

1 defense attorneys, judges, investigators. I've taught
2 students at law schools. I've taught -- I lectured at
3 Harvard Law School, Emory University in ██████████ University
4 of Louisville in Kentucky, University of North Florida,
5 Jacksonville. A number of them that I've spoken at over
6 the years.

7 Q Did you also contribute any effort at all
8 towards the eventual adoption of some of the D.U.I. related
9 administrative rules that exist in the State of Florida for
10 breath testing and things of that nature?

11 A Yes.

12 Q All right. Now, you say you have done some
13 writing on the subject as well. You've published articles?

14 A Yes.

15 Q Okay. You've done various outlines for
16 different people of the proper D.U.I. procedures?

17 A Yes, I've done training outlines and also
18 outlines that were submitted to the State and eventually
19 adopted, or there could be some changes on them, but
20 generally, they are adopted.

21 Q Okay. And training outlines went to different
22 law enforcement agencies, things of that nature?

23 A Parts of them do, yes.

24 Q Yeah. All right. I wonder if you would take
25 a minute, give us an idea, for example, as previous clients

1 whether you've ever done work for the United States Justice
2 Department?

3 A Yes.

4 Q Have you ever done work for the State
5 Attorney's Offices across the State of Florida?

6 A Yes.

7 Q Specifically you've done work for Broward
8 County?

9 A Yes.

10 Q Florida Highway Patrol?

11 A Yes.

12 Q Martin County?

13 A Yes.

14 Q Duval County?

15 A Yes.

16 Q Have you appeared before here in Manatee
17 County and been recognized as an expert witness by the
18 courts in this county?

19 A Yes, sir.

20 Q Mr. Swope, would you tell the ladies and
21 gentlemen of the jury whether or not the State of Florida,
22 specifically the prosecution, pays you when they call you
23 to testify?

24 A They do if I'm hired by them, yes.

25 Q Do you change your testimony based on what you

1 honestly believe because they pay you?

2 A No.

3 Q If you would, take just a minute. I want to
4 discuss with you whether or not you've recently been
5 involved in any special projects that relate to the
6 Intoxilyzer 5000?

7 A Yes, I have.

8 Q All right. And that's in conjunction with
9 what university?

10 A Florida International University.

11 Q Would you tell the ladies and gentlemen of the
12 jury the nature of the project?

13 A Yes. There are two individuals at the
14 university, Dr. Ferden and Dr. Rose, who have received a
15 Federal grant to work on the Intoxilyzer, and what I mean
16 by work on, to conduct experiments and to write articles
17 based on what works and what doesn't work, so to speak,
18 with the Intoxilyzer.

19 My job with them is to maintain the machines
20 that they use. In other words, I have to make sure that
21 the machines meet the test of scientific reliability, that
22 in other words when a number comes out, that it is
23 accurate, that it is reliable, that the machines are
24 working properly, because in experiments many times -- I do
25 it myself with my machines, many times you actually blow

1 them up or you cause some kind of damage to them when
2 you're -- when you're inserting different types of
3 chemicals and checking the machine's reliability, you may
4 inadvertently or just on purpose cause the machine to
5 malfunction.

6 So my job is to see that the machine is
7 working properly and, if it is not, to take it out of
8 service and get it repaired.

9 Q All right. Mr. Swope, the Intoxilyzer 5000
10 was the same machine that was used in this case, is that
11 correct?

12 A That's correct.

13 Q All right. The State of Florida has
14 administrative rules that requires those machines that are
15 used by law enforcement agencies, the Intoxilyzer 5000, to
16 be regularly maintained?

17 A Yes.

18 Q How often do they require?

19 A Well, they require -- actually there are two
20 requirements on that.

21 One is that the machine is checked by
22 maintenance officer from an agency once per calendar month,
23 and also the State must inspect the machine. It's called
24 an annual, once each calendar year, and so --

25 Q And that's a minimum acceptable level?

1 A Right. That's minimum, yes.

2 Q Short of that level, the machine could not --
3 cannot be legitimately used?

4 A That's right.

5 Q Now, if I can for just a minute, let's go back
6 to your project at Florida International University. Give
7 the ladies and gentlemen an idea of the frequency with
8 which you maintain those Intoxilyzer 5000s.

9 Do you do it at the minimal acceptable
10 level?

11 A No.

12 Q What level do you maintain them at?

13 A Well, depending on obviously the amounts and
14 types of experiments, we generally run complete checks on
15 them once every couple weeks at a minimum. If we are
16 conducting experiments where we run it over a two- or
17 three-day period, we do a monthly or what we call -- the
18 State would call a monthly. We do that every time.

19 But our test far exceeds what the State
20 requires. In other words, we go way way beyond that. We
21 do probably a series of a minimum of a hundred tests versus
22 the five that the State requires. We check processors and
23 computers and we check everything, plus we also test for
24 the solution that we know what it is. The State does not.
25 They have no idea what their solution is. They have a

1 numerical value to the second digit, but they don't know
2 what the third digit is, even though the machine reads to
3 the third digit.

4 Q Okay. Mr. Swope, let me interrupt you. I'm
5 sorry. I'm going to assume that the jurors are not any
6 more educated about this than I am.

7 A Oh.

8 Q So I need you to explain to them what you mean
9 by the solution, what you are referring to?

10 A The State requires that machines be checked,
11 they indicate each calendar month, by a maintenance
12 officer, and what they do primarily is they hook up a
13 simulator, looks kind of like a peanut butter jar, really.
14 I don't mean to infer that's what it is, but the kind of
15 what it looks like.

16 And it's sealed -- it's sealed tight so no air
17 can get into it, and it has liquid in it which really is
18 alcohol, and it turns into a vapor obviously --

19 Q Right.

20 A Without going into Hammer's Law and all the
21 physics to it. They mix a solution and the solution could
22 be .08, it could be 1 - 5, it could be 2 - 0, whatever the
23 solutions are that they do. And they test that -- in other
24 words, they take what is out of that simulator, the vapor,
25 and it simulates a breath test.

1 In other words, whatever is in the simulator
2 gets expelled into the machine and the machine then gives
3 them a reading.

4 Q So in other words, if you know you're
5 injecting a solution that's .02 alcohol and the machine
6 reads out .02 --

7 A Right.

8 Q -- in the test, you know that the machine is
9 reading accurately?

10 A That's correct. Well, that's the basis for
11 it. I don't agree with that, but that is the basis for it.

12 Q Okay. And what you're saying is that in the
13 State tests they know what the reading is but they don't
14 know what makes up that reading?

15 A Well, not necessarily. The State, when they
16 send the departments or the departments obtain the alcohol
17 solution, it only reads in two digits. In other words, if
18 you have, let's say, a .10 solution, it reads .10 on the
19 jar, even though the machine reads to the third digit.
20 Now, the reason that that's important is that because the
21 machine can only be out of compliance .005. That's all it
22 can be out of compliance.

23 But if you use a simulator solution that,
24 number one, the officer has no idea what it is other than
25 what's marked on the jar. If that solution is, let's say,

1 point -- or six tenths above what it should be and the
2 machine is off, say one tenth -- I'm sorry -- on
3 thousandth, in other words, is off one thousandth, then the
4 machine actually will kind of bring it back down to level
5 and bring it within compliance and the operator would never
6 know what that is.

7 Q And in fact, it would be inaccurate?

8 A That's correct. It would be inaccurate, yet
9 they wouldn't know it.

10 Q Okay. All right. Now, Mr. Swope, are these
11 machines infallible?

12 A Certainly not. No.

13 Q Okay. I want to ask you --

14 MR. TAYLOR: Well, at this point, Your Honor,
15 I would tender Mr. Swope as an expert witness before
16 I go any further.

17 THE COURT: I think you're just allowed to
18 proceed. I don't think you even need to do that
19 unless there is some -- if he's about to ask him
20 for --

21 MR. TAYLOR: Give them a chance to voir dire.

22 THE COURT: If you object --

23 MR. HARTERY: I would like to voir dire.

24 MR. TAYLOR: This will be, I assume, Your
25 Honor, as to qualifications.

1 THE COURT: I can't think of any other reason.

2

3

VOIR DIRE EXAMINATION

4

BY MR. HARTERY:

5

Q Mr. Swope?

6

A Yes, sir.

7

Q As a -- have any Courts in Florida ever found

8

you to be not qualified to testify on the Intoxilyzer

9

function or interpreting the meaning of the test results?

10

A As far as in a trial manner, I'm not aware of

11

any time, no, that that's ever happened. There could have

12

been issues related to something legal that is not

13

testified to, but I have no idea. I recall no instances

14

where that's occurred.

15

MR. TAYLOR: Your Honor, respectfully, this is

16

beyond proper voir dire on expert qualifications.

17

This goes to weight of the testimony and is more

18

properly and respectfully reserved for

19

cross-examination.

20

THE COURT: Well, it can be cross-examination,

21

that's for sure, but I think it's proper subject

22

now, too. Overruled.

23

MR. TAYLOR: Okay.

24

Q (BY MR. HARTERY) Do you recall giving

25

testimony at the jury trial in the case of State of Florida

1 versus Joseph Scirocco, Hillsborough County, August 22nd,
2 1996, before The Honorable Mary E. Lupo?

3 A No.

4 Q You have no recollection of that trial?

5 A No, I testify in about 80 trials a year. I
6 have no idea, no.

7 Q You would have remembered had Judge Lupo ruled
8 that you are not qualified to testify as to the -- how the
9 Intoxilyzer functions and the meaning of the test results?

10 A I think I would have, but it depends on what
11 the issue is. You're giving me a blank statement. I don't
12 know what the question was or what the issue would be. I
13 would have to know.

14 MR. TAYLOR: Your Honor, this is beyond voir
15 dire. He has to first -- I mean, I would like the
16 State Attorney's Office to first identify for Mr.
17 Swope to refresh his recollection the precise area
18 that he's questioning him on.

19 MR. HARTERY: I sure will. I'll be glad to.

20 MR. TAYLOR: Pardon me.

21 THE COURT: All right. He says he will.

22 Thank you.

23 MR. TAYLOR: And secondly, I think what Mr.
24 Swope is saying, Your Honor, is that --

25 THE COURT: We'll let him explain for himself,

1 THE COURT: That's fine. Go ahead, Mr.
2 Hartery.

3 MR. HARTERY: If he doesn't remember, I'll be
4 pleased to go through the transcript.

5 THE COURT: Okay. Why don't you put that one
6 down and go to the other one, then, that he
7 didn't -- said he did not remember.

8 MR. TAYLOR: In other words, I just want the
9 basis of the ruling identified. As he said, if it
10 was a legal issue, that's up for the Court and not
11 for Mr. Swope.

12 MR. HARTERY: The witness having testified
13 that he didn't remember, I'm going to move on to
14 another case. If he doesn't remember this one, I
15 will be pleased to refresh his memory.

16 THE COURT: All right.

17 Q (BY MR. HARTERY) Do you remember testifying,
18 Hillsborough County, March 16th, 1995, before The Honorable
19 Catherine Esrigg, in the State of Florida versus
20 Christopher T. Kierst, K-I-E-R-S-T?

21 A No. 1995?

22 Q 1995.

23 A No, I have no idea. Three years ago, no.

24 Q Yes.

25 A No, I don't remember.

1 Q Would you have likely remembered if the Judge
2 found you unqualified --

3 MR. TAYLOR: I'm going to object on the same
4 basis. He's making an allegation and he's not
5 specifically identifying the basis for it, Your
6 Honor.

7 THE COURT: I think that's what he was just
8 saying.

9 MR. TAYLOR: Exactly, and he's --

10 THE COURT: All right. So let's give him a
11 chance. Let's give him a chance to ask his
12 question.

13 MR. TAYLOR: Your Honor, respectfully, the
14 problem is he's moved from the first transcript --

15 THE COURT: Yes, sir, he has. He's now on the
16 second transcript.

17 MR. TAYLOR: I guess what I'm asking, I want
18 to make sure there's a good faith basis to the
19 question, and I want to see in that first
20 transcript, I'd like it identified.

21 MR. HARTERY: No --

22 THE COURT: Excuse me. Just speak to the
23 Judge, Mr. Hartery. Objection overruled. Proceed,
24 Mr. Hartery.

25 Q (BY MR. HARTERY) Mr. Swope?