4/14/98

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

STATE OF FLORIDA,

vs.

TRACY INTORCIA,

Defendant.

CASE NO.: 97-026411MM10A
JUDGE GINGER LERNER-WREN

Fort Lauderdale, Florida
April 14, 1998
Courtroom 510

TESTIMONY OF RICK SWOPE

The above-entitled case came on for hearing before the Honorable GINGER LERNER-WREN, Presiding Judge, at Broward County Courthouse, Fort Lauderdale, Broward County, Florida, on the 14th day of April 1998, at 8:30 a.m.

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APPEARANCES:

OFFICE OF THE STATE ATTORNEY
By: Eduardo Meire, Assistant State Attorney,
appearing on behalf of the State.

Lloyd Goldburgh, Esq.,
appearing on behalf of the Defendant.

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Whereupon,

The following proceedings were had:

THE COURT: Defense, please call your first witness.

MR. GOLDBURGH: Defense calls Mr. Rick Swope.

Thereupon,

RICK SWOEP

was called as a witness and after first being duly sworn by THE CLERK answered and testified as follows:

THE WITNESS: I do.

THE CLERK: You may be seated. State your full name, and spell your last name for the record.

THE WITNESS: My name is Rick Swope, S-W-O-P-E.

DIRECT EXAMINATION

Q (BY MR. GOLDBURGH) Good morning, Mr. Swope.

A. Good morning.

Q. What kind of work do you do?

A. I do primarily accident reconstruction. That is ninety percent of my business. And the other ten percent of my business deals with consulting on

cases pertaining to Breathalyzer, intoxilyzers, and field sobriety exercises.

Q. What is it that qualifies you to consult and deal with issues regarding intoxilyzers, Breathalyzers, and field sobriety exercises?

A. Well, as a police officer for fifteen years I have been doing breath testing or working with breath testing devices since 1974.

I last worked in 1990. I do still maintain a lot of work with intoxilyzers. I maintain them for private industries, or firms.

I do a lot of experimentation work with them. I have published articles, and have done scientific experiments with breath testing devices.

I am an instructor for the state of Florida.

Q. What do you instruct on?

A. I have instructed in the area of field sobriety exercises as well as breath testing. How to give breath tests. How to do maintenance on the machine. How to take them apart, and do minor repairs. Do those types of things.

I am an instructor for the National Highway Safety Administration, which is a branch of the federal government Department of Transportation. I hold permits in the state of Florida.

Q. You taught? Have you taught?

A. I have taught quite a bit.

Q. Have you taught others with respect to issues concerns the Intoxilyzer 5000, and also field sobriety exercises?

A. Yes.

Q. Who have you taught?

A. Well, I taught primarily at one time police officers. I still currently do some teaching. I have taught over 3,000 police officers in all 50 states.

I have published articles and outlines as indicated before. I have done research in both of those fields with breath tests and field sobriety exercises.

And I hold a permit to teach for the state of Florida.

Q. You testified that you have run experiments yourself. Have you run experiments with the Intoxilyzer 5000?

A. Yes.

Q. What kind of experiments?

A. Well, the experiments are basically run in several different types of fields. That would depend on what we are looking for.

I run experiments dealing with the software

the -- the reliability, accuracy, the mechanical functions, or what is known as error functions with the machine.

That means there are certain things the machine will pick up, and will let the maintenance operator know there is a problem.

I have run experiments in those fields when thy work, when they do not work, and what the problems are with the machine.

What is good about the machine. What is accurate, those types of things, and blood breath correlations.

Meaning that people are given measured amounts of alcohol. We give them measured amounts of alcohol, and we test them at different periods of time and separate the females from the males, and separate them by race, age those types of things.

And we say exactly what their breath alcohol level is based on formulas that we use, and what the result shows, and what the blood may show versus what the machine shows.

Q. Are you saying that in your experiments you have actually given human beings doses of alcohol -- certain known concentrations of alcohol?

A. Yes.

Q. And then also administered breath tests to them--

A. That is correct.

Q. -- in that setting?

A. Yes.

Q. Were you also observing their physical characteristics in addition to administering a breath test?

A. Yes.

Q. How many of these experiments have you done or participated in?

A. Well, I have done probably somewhere in the neighborhood of probably 50 to 60 people myself. I have been present when another couple of hundred people have been done.

In other words, when you do an experiment there are several people involved with you. You cannot do it all yourself.

Either I was a part of it, kept the logs or dosed the people. So it had been several hundred. A few hundred. A lot.

Q. You have been around breath testing equipment since 1974. How long you been around the Intoxilyzer 5000?

A. Since they first came out. That would be --

it was either late '84 or like January or February of '85.

Somewhere in that ballpark. I saw the machine first, but I did not touch it until January or February of '85.

Q. Thirteen of fourteen years ago?

A. Yes.

Q. Were you a member of BSO?

A. Yes. I was.

Q. You were a deputy?

A. Yes.

Q. Did you have anything to do with the Broward Sheriff's office breath testing program?

A. Yes.

Q. You were involved in that?

A. I was.

Q. For how long a period of time?

A. From 1984 to 1990.

Q. Now, tell me about your experience with field sobriety exercises.

You told us before that you teach or have taught, and still teach others on how to do what, administer them?

A. Yes. Administer them and evaluate them.

Q. There are two functions?

A. Yes.

Q. Have you done any experiments -- I know you said earlier you dosed humans with alcohol and observed them physically.

Have you done experiments with field sobriety exercises also?

A. Yes.

Q. Can you explain a little bit how you have done that?

A. Well it is the same thing. Field sobriety exercises are done in different categories, and the articles I wrote dealt with the police academy.

And volunteers are brought in -- we usually do not have trouble getting volunteers -- we have volunteers come in, and we separate them by male and female, and we ask for a drinking history.

Some people drink a lot. Some do not. We split them into groups. We want the -- the goal is to see how individuals perform at certain levels of alcohol.

In other words, can a person who has been drinking, can they pass a certain exercise? Or a person that has five drinks can they pass an exercise?

Anyway, we break that down into all kinds of different formats as to what we call the difficulty of

the test, difficulty of exam, and we break it down by other functions, but that is really where we start.

Q. Yesterday Deputy J. Zagar, who is in charge of the breath testing program in Broward County took the witness stand and testified as to the subject of absorption and elimination.

Are you familiar with that topic?

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A. Yes.

Q. Can you describe it briefly, what does it mean?

A. Absorption very simply is when alcohol is taken -- obviously it is taken into the system into the stomach.

It takes a period of time to be absorbed into the blood stream to where it begins to affect you.

If I drink, and have a complete beer in front of the jury, it takes time to get in my system. It is not affecting me at that point.

It takes a period of time to get absorbed, and get into the system.

Elimination is the reverse of that. After it is in the system, it takes a certain period of time for the alcohol to eliminate.

And there are various ways of elimination.

It would be done through time, which is probably the most logical one.

People, who vomit, alcohol can be eliminated. People that go to the bathroom. There are different ways that alcohol can be eliminated from the system. So absorption and eliminations is the reverse of each other.

Q. When you are absorbing, it is going from your stomach into your blood. When you are eliminating, your system gets rid of it through your liver, or skin, or other ways that you mentioned?

A. A variety of ways. Yes.

Q. Have you ever read any studies by any of the leading experts in this field dealing with alcohol metabolism on human beings and the topic of absorption versus elimination?

A. Yes.

Q. How many?

A. I do not know.

There are probably -- I have read probably a few hundred over the past twenty some years. Primarily what I consider to be a few authors that are really into it, and they are noted authors.

Q. Who are they?

A. Kurt Dubowski would be one. Dr. Jensen out

of Minnesota would be another. There is an individual named Smith, Cole. Those are the main people that I read articles about.

Q. Do you consider them experts in the field?

A. Sure.

Q. Mr. Swope, based on the research that you have done, and the studies that you have read, do you know what the experts say the average rate of absorption is for human beings?

A. Yes.

Q. What is it?

A. The average rate is 30 minutes to 114 .

Q. Does that mean from the time the person stops drinking alcohol you have approximately an average of 30 minutes to 114, before they start absorbing it into the blood?

A. That is correct.

Q. If you were given a breath -- the test result taken at a particular time, and you also were given an approximate time that no more drinking was being done -- let me give you a hypothetical.

A person comes into contact with law enforcement at approximately one o'clock. So you have to assume that there is no drinking after one o'clock?

A. I would agree with that. Sure.

Q. Then at approximately 2:26 a person takes a breath test.

A. Okay.

Q. The results of that breath test are a .19?

A. Okay.

Q. That is approximately how much time?

A. Well obviously an hour and 26 minutes. Almost an hour and a half.

Q. If that is all you knew, would you know whether this person was absorbing alcohol or eliminating alcohol at this time?

A. No.

Q. Would you know whether the person is absorbing alcohol or eliminating alcohol at this time?

A. No.

Q. What other information would you need?

A. Well, I would need primarily the time that the drinking stops. I would need to know that period of time, or when the last drink was consumed so to speak.

Q. What else?

A. I need to know the weight of the person.

Q. Let's assume that the weight is 120 pounds. What else would you need to know?

A. When they ate last.

Q. You said you would need to know this information?

A. Yes. To give you -- I assume you want an accurate figure.

Q. Yes.

A. I could guess.

Q. I would like you do give me an accurate figure.

A. To give you an accurate figure I need that.

Q. You have the time the drinking stopped.

A. Obviously it would help if I knew what they were drinking.

Generally alcohol has a range, but if I know what they were drinking that would nail one more accuracy scenario I would give you.

Q. What if all you knew was four drinks?

A. I can come up with an average figure. I have to ask a couple of questions about the drinks.

Q. Like what?

A. What they were.

Q. What else?

A. How big they were. That is primarily it. I can figure the alcoholic content if I know what they were.

Q. I will not give you anymore information.

That is not in evidence.

But based on this hypothetical Deputy Zagar testified yesterday assuming the results are accurate that at 2:26 this person would be eliminating, already at 2:26, if the drinking stopped somewhere before one o'clock.

Do you agree with that?

A. No.

Q. Well, why not?

A. Because we do not know the factors I indicated to you.

Q. You do not know these factors?

A. No.

Q. Would they make a difference?

A. Sure.

Q. Based on a hypothetical, you know, 120 pounds, five foot three, and assuming that the results are accurate, if this person blew a .19 at 2:26, and 120 pounds, five foot three, and assuming elimination pursuant to Deputy Zagar's testimony, what would you expect that person's breath alcohol level to be at one o'clock -- about what is it 90 earlier, less than that 84 minutes earlier?

MR. MEIRE: I would object because there are not enough facts in the hypothetical according to

the expert to make a determination accurately as to what the total would be.

MR. GOLDBURGH: That is my point exactly.

THE COURT: You know, it is his witness, counsel. If he feels he can respond, let him respond.

THE WITNESS: At the time figuring that it was a .19 at 2:26, and you want to know what they were -- or what it wasn't at one o'clock?

Q (BY MR. GOLDBURGH) You would expect it to be higher?

A. It would be approximately about a .24 to .25.

Q. So you are saying --

A. Nine to ten drinks.

Q. If this reading is accurate at 2:26, at one o'clock you would expect that person to be at a .24. That is more than three times the legal limit?

A. Yes. Three times.

Q. You know the legal limit in Florida?

A. .08.

Q. Now, assuming the 120 pounds, five foot three, and the .24, would you be able to estimate with a reasonable degree of certainty how many drinks it would take this person, or how many ounces of alcohol

it would get to be a .24?

A. Yes.

Q. How many?

A. It would be nine and a half to ten ounces. That is in the system at the time.

Q. So, assuming nine and a half to ten mixed drinks with a shot, or nine and a half beers, round about?

A. Correct.

Q. Now, if the person has at 120 pounds, five foot three, nine and half to ten drinks in her system at this time what kind of physical observations would you expect to see?

MR. MEIRE: I would object to that, Your Honor.

THE COURT: Overruled.

THE WITNESS: I would expect to see some symptoms associated with someone who is basically extremely impaired.

Not only bloodshot watery eyes, but someone that cannot stand without assistance. Someone very unsteady on their feet.

Someone with bloodshot eyes, and slurred speech. A person basically not able to comprehend, or understand questions and respond

as liked.

Q (BY MR. GOLDBURGH) Would they be able to interpret and follow instructions based on your experience?

A. Probably not.

Q. Obviously, people have -- there are people that have a higher tolerance for alcohol?

A. There are people that drink every day, and drip excessively, and they can tolerate that more than the average person.

The average person would not be able to function at that level.

Q. The hypothetical does not assume any drinking history, correct?

A. That is correct.

Q. You had an opportunity to view the video in this case?

A. Yes. I did.

Q. In your observations of how Ms. Intorcia looked on the video --

MR. MEIRE: Objection to observations on the video.

THE COURT: Sustained.

Q (BY MR. GOLDBURGH) You said extremely impaired, right?

A. Yes.

Q. Now, you testified on your knowledge of how the intoxilyzer works?

A. Yes, sir.

Q. Okay. And you have done your own experiments?

A. Yes, sir.

Q. Are you familiar with the stages that the Intoxilyzer goes though when, you know, when the operator presses the start button?

A. Sure.

Q. Actually, are you familiar with this document, or at least this type of document?

A. Yes. I have seen it.

Q. What does that represent?

A. Well, it represents a print out card of the Intoxilyzer. It is not completed, but it represents a print out card.

Q. Let's complete it for you. How about that? It still needs another air blank after this?

A. Right.

Q. Now the person that is operating the intoxilyzer will press the button, and put this card into the Intoxilyzer?

A. Correct.

Q. Now, you use the term air blank?

A. Yes.

Q. What is that for?

A. Well. An air blank --

Q. What is it for? What does it do? What is it supposed to do?

A. The air blank is to ensure that the machine does not have other than ambient air present in the chamber prior to another sample being taken.

This is there to ascertain that no residual or other alcohol is left over in the chamber so that it may affect another reading later.

Q. It is supposed to assure that there is no alcohol left over from a prior subject, or other contaminants?

A. Whatever could be in the area.

Q. Then it will ask for the subject to blow?

A. Correct.

Q. And then it cleans out the sample chamber again?

A. Yes.

Q. And it asks the subject to blow?

A. Yes.

Q. And the air blanks do the same thing?

A. Yes, sir.

Q. As far as you know they are supposed to clean the sample chamber out so it is getting what it believes to be a clean subject from the subject blowing at the time?

A. That is correct. Yes, sir.

Q. Deputy Zagar testified yesterday that the way that the operator knows that there is no contamination in this machine from a prior subject is because this breath card will take a -- he said the breath card will give triple zeros during the air blank, and he said on the LED display you will see triple zeros.

cont

He also testified that there is something called an ambient air failure, and that will tell the operator that there was some contamination left over, is that true?

A. No.

Q. Why not?

A. The ambient failure will only go off on basically the first test of the day, so to speak.

If there is ambient air, other than ambient air, if it is not detected on the first time, you can have all kinds of alcohol in the chamber and never pick it up again. What happens is the machine zero references itself with what is in there.

In other words if the machine could think, the machine thinks as it goes through the check that there is nothing in the chamber.

So the machine is assuming that because it is sucking in air from the room that it has to be zero, zero, zero.

If you turn a computer on, it reads certain things every time. When you turn it on if it changes the computer will automatically -- in this case the Intoxilyzer -- references if there is alcohol it will believe it to be clear air, and reference itself on that. I know it is confusing, but--

Q. Are you saying that even if there is alcohol left over from a prior subject that it will automatically say zero?

A. Yes.

Q. How does that happen?

A. Because of the software check. The software is supposed to read zero, zero all the time. The subject test -- the analysis of the software.

The software is meant to pick up what is blown into the sample chamber. It gives you a reading at that point, but on the air blanks, it will always read zero, zero, zero.

That is what it is programmed to do.

Q. Regardless if there is alcohol?

A. No matter what happens you will get zero, zero, zero.

Q. Obviously, you know this. Let me ask you the pointed question.

If this is not the breath -- first breath test of the day, and someone else blows before this particular person, is there any way to be sure that the results obtained is an accurate result based on this air blank situation?

A. Yes.

Q. How?

A. You can do a test between each subject test.

Q. If you do not do that test between each subject test, would the operator know if there is any contamination left from a prior subject?

A. Not likely. No.

Q. What is this test you are talking about?

A. The test is what is called additional -- we call it a controlled test.

When we do experiments, and we hook up a simulator to the machine, and between, and after each subject test we have an air blank, and we have a control test.

And what that does -- we put a solution, and

we mix it usually for our experiments at a .15. You can do whatever. So we know what is in this controlled sample.

I know that in this controlled sample I have a .15, or whatever the number would be. Then I inject that into the Intoxilyzer, and that way if there is a problem I know immediately that something is wrong.

Q. You can do that at the time that the subject takes the breath test?

A. Yes. It is easy. You hook the simulator, and flip another switch on the side. Set it.

Q. Could the operator do that during the time the subject takes a breath test?

A. Sure. They could.

Q. Why is that important?

A. It is important because the operator wants to make sure that when you are conducting the test that there is no contaminants.

In the event one does happen, you have a solution that, you know, what it is. Obviously, you do not know what the subject is. You have an estimate, but you do not know.

This way by putting something in the machine that you know is correct if there is an error, you see it immediately, and you say I have a problem with, A,

B, C, or D, or take actions or steps to correct it.

Q. That can be run between each blow, and beforehand?

A. You can run it once, three times. Normally they take thirty seconds.

Q. Deputy Zagar said that when he does his agency inspection, he does it once a month?

A. Okay.

Q. He says he gets premixed solutions from another company, and that they come in a bottle with a number on it at different values. A .05, .08, and .20.

I asked him how do you know that your intoxilyzer is accurate every month? And he said because we use the solution, and run it through the machine.

And I said to him, how do you know that your solutions are accurate? He said, well I ran them through different machines five or six times, and that tells me my solution is accurate.

I asked him the question. I said does that make sense for you to test the machine with the solution, and the solution with the machine?

Now, his answer was it is forensically sound. Do you agree with that?