IN THE COUNTY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA	
-vs-	CASE NUMBER: 96-037235TC A02
ROBERT JOHNSON,	
Defendant.	

ORIGINAL

EXCERPTS OF JURY TRIAL
(TESTIMONY OF RICK SWOPE)

PRESIDING: HONORABLE ROBERT SCHWARTZ

APPEARANCES:

ON BEHALF OF THE STATE OF FLORIDA:
BARRY KRISCHER, ESQUIRE
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ON BEHALF OF THE DEFENDANT:
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Thursday, April 10, 1997
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida
Beginning at 2:30 o'clock p.m.

I N D E X

E X H I B I T S

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause before the HONORABLE ROBERT SCHWARTZ, one of the Judges of the aforesaid Court, at the Palm Beach County Courthouse, located in the City of West Palm Beach, State of Florida, on the 10th day of April, 1997, beginning at 2:30 o'clock p.m., with appearances as hereinbefore noted, to-wit:

(Only the testimony of RICK SWOPE was requested to be transcribed, and the following proceedings were had:)

THE COURT: Defense, call your next witness, please.

MR. PELOKE: Thank you, Your Honor. The Defense would like to call Rick Swope, please.

RICK SWOPE,

after being called as a witness by the Defense and after being first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE WITNESS: I do.

MR. PELOKE: May I proceed, Your Honor?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. PELOKE:

Q. Mr. Swope, could you state your full name and address for the record, please?

A. My name is Rick Swope, S-w-o-p-e. I reside at 2941 Southwest 87th Avenue in Davie. I have an office in Davie, Florida, and one in Atlanta, Georgia.

Q. And what is the nature of your employment, Mr. Swope?

A. I'm self-employed. I own the company. I do, primarily, accident reconstruction. That's about ninety percent of my business. The other ten percent of my business encompasses teaching, doing lectures, doing experimentations with different types of breath machines, teaching field sobriety exercises to police officers, lawyers, and private individuals who wish to retain my services for that purpose.

Q. Specifically as to Breathalyzer machines and breath alcohol concentrations in DUI cases, could you state for me your qualifications to testify as an expert?

A. Well, I've been a breath operator since 1974. I was a police officer, for fifteen years. The last six years of my employment, I was with the Broward County Sheriff's Office. I was the supervisor of the Traffic Homicide and DUI Task Force Units for four of those six years. I conducted somewhere in the neighborhood of seven to eight thousand breath tests.

I have a bachelor's degree in criminal justice from St. Thomas University. I have a master's degree in

technology and engineering from the University of Miami.

I'm an instructor for the State of Florida, have been an instructor with the Florida Department of Law Enforcement since 1985. I'm also an instructor with the National Highway Traffic Safety Administration, Department of Transportation. Since I left and went into private practice in 1990, I have maintained my certification. Although, obviously, I don't give -- test criminal cases anymore because I'm not a sworn police officer. But I have kept up on the technology of the machines.

I am a co-owner of one machine. Up until 1996, I maintained four training machines at Broward Community College that were used by the police department in training breath operators. I also work on two or three private machines, where individuals have them, either law firms or some type of private businesses.

I have written articles involving the breath-testing machine, specifically the Model 5000 series. There's actually a series of those machines. The State of Florida uses two different model numbers. There are actually three models of Intoxilyzer. We use two here.

I've taken apart the machines. I've conducted experiments in labs with doctors, lawyers, defendants,

other individuals, where I have been asked to do certain studies. I have done certain studies, on my own. In other words, I've had subjects drink certain amounts of alcohol. Blood was taken, at certain times, from them. We would compare the two results, put those together. We'd also do it with people who had different types of things, such as people with dentures or people who had mouthwashes, mouth sprays, different types of substances in the mouth, anything from gasoline to different types of alcohol, people with medical problems. The list goes on and on. And I have written several articles about that and addressed the issues, good and bad, with the machine. There are good things with the machine and there are bad things with the machine. And I've addressed what I feel is good and what I feel is bad.

Q. Mr. Swope, approximately how many times have you testified in an expert witness capacity prior to today?

A. Well, not counting the reconstruction, I've probably testified somewhere in the neighborhood of about -- probably over four hundred times for a state agency, probably about -- maybe a hundred and twenty, hundred and thirty times for the Defense.

Q. So, you have testified for the state before, in Breathalyzer cases?

A. Oh, sure.

Q. That's as an expert witness?

A. Yes.

Q. And, Mr. Swope, have you performed any scientific studies yourself relating to the slope detector of the Intoxilyzer 5000?

A. Yes, quite a few.

Q. And what is a slope detector, specifically?

A. Well, a slope detector is meant to -- there are things, actually, that the machine looks for, its time, pressure, and slope. The slope is meant to address any type of substance that may be in the mouth that -- specifically alcohol, actually, that is in a high concentration. And I guess, the only way to put it mildly is that there are times when an operator gives a breath test where an individual is so impaired that they throw up or they have what's called -- we call it the wet burp, where somebody gives a burp and they almost throw up but they don't actually and they swallow it back down. And that brings up the concentration of alcohol from the stomach and, obviously, the concentration in the mouth, at that time, is very high. So, the detector is meant to pick up a high amount of alcohol. Same thing as if -- if I took a drink now and spit it out and blew in the Intoxilyzer in thirty seconds, obviously, I have no

alcohol in my system, in other words, I haven't swallowed it and I'm not consuming alcohol before I came in here, but the Intoxilyzer is going to show a reading. And it should show a reading because it's meant to pick up ethanol. But it's -- it's only meant to pick up a high volume of alcohol. Therefore, if I have alcohol that is in my mouth, for a period of time, or maybe I have a burp but it's not that -- a wet burp, so to speak, or I swish my mouth out or I have something to hold the alcohol in my mouth, such as gum or dentures, or something, where alcohol can get trapped, it may give an erroneous reading.

And there are different ways to look at that. One could be a variation of the readings. In other words, one reading could be high; one reading could be low, and then you have the third or fourth reading that kind of falls somewhere within there. So, that's a trigger to the operator, in other words, to know that, look, if the slope detector isn't working, well, maybe I won't be able to pick that up, but if my readings are erratic, that could be another warning to the operator that, hey (sic), maybe something is up and I should look at it.

Q. Basically, then, one of the purposes of the slope detector is to detect the presence of mouth

alcohol. Is that a fair account?

A. A high presence of mouth alcohol. In other words, if it doesn't detect it, it doesn't mean it's not working. It's just meant to detect a very high volume of alcohol. If it's a low volume of alcohol, it'll never detect it. Never.

Q. Approximately how many articles have you published yourself regarding the Intoxilyzer 5000?

A. Well, articles that have been published nationally are three. I've published three nationally; I've co-authored about four or five, meaning that other authors actually wrote it, and I did studies that they -- I let them use my studies, or maybe I wrote anywhere from six paragraphs to four pages and I was incorporated or mentioned in their article. And I've written probably about -- oh, maybe seven or eight training outlines for the state. In other words, I've written training outlines on what officers should follow, for procedures, as to how -- what questions should be asked, how a test should be administered, those kind of things.

Q. And this is for the Intoxilyzer 5000?

A. That's correct.

MR. PELOKE: So, Your Honor, based on this expert's qualifications, I would like to tender Mr. Swope, at this time, as an expert witness.

THE COURT: Any objection, State?

MS. MARTINEZ: No, Your Honor.

THE COURT: All right.

BY MR. PELOKE:

Q. Mr. Swope, how did you become involved in this case?

A. You contacted me -- I don't know, several weeks ago, I believe, and asked me if I would look at this particular case. There were two things that you wanted me to look at. One was the discovery that was provided in the case and the other was, I believe, a videotape. And I told you to send it to my office. I would look at it.

I only accept about -- well, right now, it's only about twenty percent of the cases I get, where I actually accept them. In other words, I look at them, and eight percent of the cases go back because there's not a whole lot I can do for you, in certain cases.

I looked at this case and I thought it was a case that I could be of help, in explaining the case and what I felt was wrong, and that's how I became involved.

Q. Well, the defendant's paying you for your presence here today.

A. He's paying me for my time. Absolutely. I bill everybody for my time.

Q. And you don't become involved in every case a Defense attorney offers to you, that's correct?

A. Oh, no. I -- no. No way. I -- I look at probably four hundred cases a year. I take maybe twenty percent of those, at most, maybe twenty-five.

Q. Did you have an opportunity in this case to actually review the discovery and the videotape that was provided to you relating to these Breathalyzer tests?

A. Yes, sir, I did.

Q. In terms of some of the Probable Cause Affidavit statements, Mr. Swope, if a suspect had a disabled knee, where his A.C.L. is actually absent and he has minuscule tears, could that affect his ability to satisfactorily perform some of the physical field sobriety exercises?

A. Well, if there's any type of injury on a person, it could, sure.

Q. Do field sobriety exercises affect normal physical functions?

A. Right. The normal faculties, that was what we call it, yes.

Q. But it does not affect someone's ability, in terms of their normal walking patterns, correct?

A. No, it doesn't.

Q. And most field sobriety exercises are just

predictors of alcohol impairment?

A. Most of them, yes.

Q. In terms of the Romberg alphabet test -- or, exercise, that's an exercise where a suspect has to put his feet together? Is that correct?

A. That's correct.

Q. And throw his head back?

A. That's correct.

Q. And then recite the alphabet or parts of it?

A. Yes.

Q. And could a knee disability affect someone's ability to stand with their feet together and put their head back, in that manner?

A. It could, yes.

Q. Could you explain to the jury exactly what the C.M.I. Intoxilyzer 5000 is?

A. Yes.

The Intoxilyzer -- as I indicated, there are three different models. I believe, in this case, if I'm not mistaken, it was a '64 model, which -- let me just check here.

It was a '64 series. That was the first series that C.M.I. came out with. And really, in lay terms, it's an infrared breath-testing device, meaning that it takes a sample of one's breath. One places their breath

into the machine. It then converts it, based on a blood/breath partition ration, to a breath alcohol reading.

To give you a good example of how it works, very simply is, if you have a balloon and you blew that balloon up and you took a flashlight, and you took the flashlight and the beam goes through the balloon and comes out the other end. And let's say, you're going to measure the amount of light that comes through. So, you take a measurement of that. And now you take the same balloon and you take a puff of smoke, or something, and you blow it into the balloon. There's going to be less amount of light now coming through because the smoke is in there and it's kind of going to absorb some of that light. If you could take a measurement between the two readings, the clean air and the smoke -- smoky air, that's really what the Intoxilyzer does, same basic theory. It has clean air -- or, you hope it has clean air in the chamber, and then it takes ethanol in and it gives you a reading between the two, and that's where it comes up with the numerical value.

Q. Can human error affect the reliability of the breath readings of the Intoxilyzer 5000?

A. Sure.

Q. And how so?

A. Well, an operator comes into play probably more so than maybe it's realized. An operator who has experience can detect many things, such as a person who is maybe burping, a slope detector that's not working properly, a clock or a printer that's out of synch, somebody who's not blowing properly, little things like that that you can just see, on the outside. Mechanically, as far as what may or may not be operating properly on the machine, it would take more of an experienced operator to find out if they're having problems, such as erratic readings. Maybe an individual is blowing their brains out, so to speak, and the tone is being erratic. The breath's not getting through. Could be a variety of reasons. Could be the hose; could be the mouthpiece. So, the operator has a play in the machine, if they're trained properly.

Q. Well, how can an operator detect malfunctions with the slope detector is the machine doesn't indicate there's a malfunction?

A. Well, an example would be -- I don't know if you the breath card but, in this case, the breath card is an example --

MR. PELOKE: Hold on.

Your Honor, may I approach the witness with the State's exhibit relating to the breath

card?

THE COURT: You may.

MR. PELOKE: Would that help you, Mr. Swope?

THE WITNESS: Yes, it would.

MR. PELOKE: May I approach, Your Honor?

THE COURT: You may.

MR. PELOKE: Thank you.

This is previously marked State's exhibit, which was entered evidence relating to this case.

THE WITNESS: Okay. Could I use this board here? Would that be okay?

MR. PELOKE: Sure.

Is that okay, Your Honor?

THE COURT: Certainly.

MR. PELOKE: May the witness step down?

THE COURT: Yes.

MR. PELOKE: Thank you.

THE WITNESS: On this particular part, I'm not going to write out everything on the bottom. But the readings -- first reading you have is an air blank, in this particular case. Then you have a one-two-nine (sic), then you have another air blank, which is all standard. So, up to this point, there's no problem. You know, it's not

something unusual. Now, the second reading you have is -- it comes up as basically a warning down here to the operator, which is printed out, anyway, at the bottom of the card after the test. And the operator now would see that he does not have an -- over here, he does not have a .02 agreement between the two readings. So, now you have to ask yourself one question. Well, number one, is it possible that, on the slope -- and the slope goes something like this. It'll be a nice even slope, and then it would come down -- and it can drop off after the breath test. No big deal. Or you have a spiking, where the alcohol level goes up and then drops. Now, the operator, because there's no oh-two (sic) agreement, has to ask himself one question. Well, which one is it? And now I have to take a third reading. And my readings should be consecutive. In other words, if this reading has to be believed or if this reading has to be believed, then, the next subsequent reading should be within an oh-two (sic) of the previous reading. Well, again, we don't have that here. We have two readings within an oh-two (sic) but we have the first reading and we have the third reading, so now we don't have anything consecutive. Because, to get a reliable

reading, you must have consecutive readings.

Now, the rules don't require that, in this state but, as far as scientifically goes, none of these readings now -- and they mean zero. They mean nothing to me, in looking at readings, because you don't have anything consecutive. So, therefore -- and the machine has told the operator that there's no oh-two (sic) agreement, so now, rather than having -- nowhere in there do we have two consecutive readings. Now -- in other words, if this oh-nine-eight (sic) came up down here, an oh-nine-eight (sic) or an oh-eight-seven (sic) or oh-one-oh (sic), now I'd look at it and say, well, now they're closer; we had two consecutive agreements, so now I can feel comfortable that everything is fine. But because they're not consecutive -- we have a high one; we have a lower one; we have a high, now the question is, what's the next one going to be? We don't know. It could be high again; it could be low again. We don't know.

DIRECT EXAMINATION (Continued)

BY MR. PELOKE:

Q. So, in terms of the scientific analysis of those results, where you're primarily concerned with

reliability and truthfulness, those results mean nothing to you, in terms of --

A. They mean nothing, no.

Q. -- this defendant's potential blood -- or, breath alcohol level?

A. That's right. They mean nothing.

Q. Could that middle result, .098, be attributable to the defendant not blowing enough air in the machine?

A. Well, could it be? That's hard to say. And you still have an ethanol reading, but the fact is, is that, apparently, since there's no asterisk here -- and this is what I would look for. If there's no asterisk here, that means that whoever blew into the machine met this requirement. So, the machine was satisfied because there's no asterisk. So, saying could it be because he didn't blow hard enough, my response would be, absolutely not, at that point, because, if he didn't blow hard enough, the machine has a device to tell you that. Because, we're looking for three things, time, looking for pressure, looking for slope. If one of those three things, or all of them, are not satisfied, the machine will tell the operator, take another test. And on this card, I don't see that.

Q. Now, if the slope detector is not detecting the presence of mouth alcohol, can a technician do anything

about that, at that time? If the machine says the slope detector is working properly and, yet, it's malfunctioning, for some reason, that's possible, correct?

A. Sure.

Q. Now, what can the technician do, at that time?

A. Well, you mean, as far as the subject goes?

Q. Yes.

A. Well, he can do a lot of things, at least from what I saw. You're talking about this case, I would assume.

Q. Correct.

A. Well, number one, is, there was a foreign object in the mouth, which had to be removed, in this case. On videotape, I saw the -- I forget what time it was, but -- at 8:03, and the first test is 8:05. So, at 8:03, a foreign substance -- well, actually, I consider it to be a foreign substance, was taken out of the defendant's mouth, which was then -- that means that a twenty-minute observation period must be conducted, from that point on.

Q. And that is for what purpose?

A. Well, for the purpose of -- the same purpose the operator asked him to take the teeth out. I mean, if the teeth aren't a problem, why don't they leave them in?

They asked him to take the teeth out because they know there's a problem with dentures. The dentures were removed. Rather than rinse the mouth out and get out whatever a person uses -- Poly Grip, Denture Grip, whatever they may use in their mouth, rinse that out, get rid of that, wait your twenty minutes, and then go give your test, just like an observation period would be. Because that wasn't done, that's another factor on why these readings are inaccurate.

Q. But how would you respond to the argument that, irrespective of the waiting period, if these dentures contained mouth alcohol, then the machine would tell us that, through the slope detector?

A. No. Only --

Q. Why is that?

A. Only if it's a high concentration. In other words, if there's a very high concentration in the mouth, enough to make this level go up, immediately, then the operator would know. But if there's not a high concentration, if there's a lower-volume concentration in the mouth, then, the detector's not going to pick it up. But that's why a secondary -- and I call it a secondary device, even though it's the operator. This tells you, right here, something's wrong. The card is telling you this. It's not like it's hiding something.

Q. And in this case, the technician did nothing, after realizing there could have been a problem.

A. That's correct.

Q. Now, in terms of the low content of mouth alcohol not activating the slope detector, does that mean that that mouth alcohol is influencing the overall test results that we're showing here?

A. It could be, sure.

Q. It could inaccurately elevate those results, correct?

A. Well, absolutely.

Q. Now, Mr. Swope, if someone consumes alcohol, they don't personally know whether this alcohol is going to concentrate in their dentures or some other foreign object, correct?

A. I wouldn't expect anyone to know that, no.

Q. In this case, the defendant testified, previously, that he uses a denture adhesive by the name of Sea Bond.

A. Okay.

Q. Are you familiar with that product?

A. Yes. It was one of the things that we used in our class. As a matter of fact, we're doing a class today with Sea Bond in Atlanta. I flew in for this hearing and I'm going back, and we're doing studies today

and tomorrow on dentures, actually in Atlanta, at the various conference centers, myself, Dr. Jensen, and two other technicians.

Q. Does Sea Bond have an oil base, to your knowledge?

A. Most of them do, yes.

Q. Does that have any significance, in terms of the mouth alcohol issue that's here?

A. Well, obviously, if the substance, itself, is just a -- I call it, like, a grabbing substance. In other words, it retains whatever is around it. If you're drinking Coca Cola, it retains some of the Coca Cola; if you're eating, it retains certain things. It's kind of -- it's -- really, all it is, it's sticky. You know, oil base kind of holds things. That's all it does. Like, it mixes, like, oil and water, so to speak. In other words, it kind of like stays together, for a while. And that's kind of what we found. They're, again -- you know, there's some that aren't oil base and some that are. It just depends on the particular type that you get and how much. Some people use a little; some people use a lot.

Q. Now, the defendant testified in this case that he consumed two glasses of rum and Coke while his dentures were on and while he was using Sea Bond. And he only removed the dentures prior to the Breathalyzer being

administered. Could the presence of that Sea Bond, in any way, affect the reliability of the results of this defendant?

A. Yes.

Q. And how so?

A. Well, we don't know how much because we don't have any tests to show us that. Could it inflate the reading? Sure. Could it keep mouth alcohol in the mouth? Yes. Do I know how long? No. On some people, it stays in there for a short period of time, meaning, ten, fifteen minutes. We've had tests go an hour and a half or longer, where there's been mouth alcohol. And those were people that we've actually experimented with that had nothing to drink, other than what we gave them in testing.

Q. Now, there were deputy sheriffs who previously testified in this case that the fact that Mr. Johnson's mouth was not inspected after he removed his dentures, and that there was no twenty-minute observation period complied with had absolutely nothing to do with these results. Could you respond to that, in terms of the possible presence of mouth alcohol and the Sea Bond in his mouth?

A. Well, I would say that's ridiculous, because if there's no problem, why would you have them remove the