

IN THE CIRCUIT COURT OF THE STATE OF FLORIDA,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

Plaintiff,

Case No. 052-6725

-vs-

Division: "D"

KRISTOPHER T. KIERST

Defendant.

PROCEEDINGS: EXCERPT FROM JURY TRIAL

BEFORE: Honorable Katherine Essrig

DATE: March 16, 1995

TIME: Beginning at 9:30 a.m.

PLACE: Hillsborough County
Courthouse Annex
Tampa, Florida

REPORTED BY: Shelley L. McKinney

COPY

A P P E A R A N C E S

On behalf of the Plaintiff,

JAY TREZEVANT, ESQUIRE
KIM HELPER, ESQUIRE
Assistant State Attorneys
Third Floor - South Tower
County Courthouse Annex
Tampa, Florida

On behalf of the Defendant:

GUY GILBERT, ESQUIRE
TRACY SHEEHAN, ESQUIRE
Assistant Public Defenders
Fifth Floor - North Tower
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Tampa, Florida

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RICK SWOPE,

was called as a witness by and on behalf of the Defendant and, after having been first duly sworn, was examined and testified as follows:

THE COURT: Please state your full name and spell your last name.

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

THE COURT: Thank you.

You may inquire.

MR. GILBERT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GILBERT:

Q Mr. Swope, what's your occupation?

A I have my own business. I do primarily accident reconstruction, which is the reconstruction of motor vehicle accidents. I do primarily accidents where people have died in car accidents. That's about ninety percent of my business and the other ten percent of my business is with consulting on DUI matters as it relates to testing, field sobriety testing, the Intoxilayzer 5000, 5000R models.

I write articles in -- for DUI

1 publications and I write training outlines for the
2 State of Florida for police academies or academies.
3 And I teach at the Broward County Police Academy and
4 I've taught there since 1985.

5 And I lecture around the country in
6 DUI-related matters, whether it be direct testing, it
7 could be on field sobriety testing. I lecture on that
8 and also DUI as it relates to traffic accidents. And
9 I also do some lecturing for various universities. I
10 teach for the University of Louisville, the Southern
11 Police Institute in Kentucky, and I've also taught at
12 the University of North Florida in Jacksonville.

13 Q And so do you charge us for your
14 services today?

15 A Yes.

16 Q Will that affect your opinion or your
17 testimony today?

18 A No.

19 Q How many times have you been declared an
20 expert witness in court?

*21 A In criminal cases I have been declared
22 an expert about 250 times relating to DUI matters.
23 That's either as an officer or in my private practice.
24 And I have testified about another 105 to 110 times
25 and that's in accident reconstruction and that's all

1 been since 1974.

2 Q And have you testified solely for the
3 defense or the State?

4 A No.

5 MR. TREZEVANT: Objection, Your Honor.

6 Irrelevant.

7 THE COURT: Overruled.

8 THE WITNESS: No.

9 BY MR. GILBERT:

10 Q Are you familiar with the Intoxalyzer
11 5000?

12 A Yes.

13 Q Are you familiar with the Intoxalyzer
14 5000R?

15 A Yes.

16 Q And what's the difference between the
17 two of those machines?

18 A Well, primarily there are -- actually
19 there were two different series. CMI is the maker of
20 the Intoxalyzer and its introduced a third series.

21 THE COURT: Please try to explain when
22 you say the Intoxalyzer 5000R.

23 THE WITNESS: It's a machine to conduct
24 breath tests on individuals and produce a
25 breath sample when you blow into it through a

1 hose and the machine gives out a reading. And
2 there are several different models, although
3 the difference between models basically is the
4 same. Update is what it's been like when new
5 models were introduced and there actually are
6 three models of the Intoxalyzer 5000. The most
7 current model is the 58 series. There's
8 actually three models.

9 BY MR. GILBERT:

10 Q Who have you taught field sobriety
11 testing to?

12 A I have taught field sobriety testing to
13 police officers in the State of Florida and I have
14 taught approximately almost 2,000 officers in the last
15 ten years, either at the police academy, where
16 officers come in and it's part of their training, or I
17 train officers on a contractual basis pertaining to
18 that.

19 So if the police academy or the Florida
20 Department of Law Enforcement or some agency in the
21 State of Florida wants to hire me, I can come in and
22 teach a field sobriety testing class.

23 There are different types of classes I
24 teach related to field sobriety testing. One is the
25 21-hour course or the 20-hour course, it could be 20

1 or 21 depending on your counting. And then there are
 2 courses for instructors, for individuals who have
 3 taken all the preliminary courses but may want to go
 4 on and teach officers in their department how to
 5 conduct these tests.

6 I am certified by the National Highway
 7 Traffic Safety Administration to actually sign off and
 8 teach instructors or people who become instructors and
 9 they can go back to their agency and teach.

10 MR. GILBERT: Your Honor, at this time
 11 we'd ask the Court to declare Mr. Swope an
 12 expert in the Intoxalyzer 5000, the Intoxalyzer
 13 5000R, and field sobriety testing.

14 MR. TREZEVANT: Objection --

15 THE COURT: All right. Please approach
 16 the bench for a moment.

17 (Whereupon a bench conference was held
 18 out of the hearing of the jury as follows:)

19 THE COURT: I have assumed from your
 20 objection to some, if not all. Which
 21 specifically are you objecting to?

22 MR. TREZEVANT: Both as to the field
 23 sobriety testing and the intoxalyzer, all of
 24 that.

25 THE COURT: So you want at this point to

1 voir dire the witness? I will allow one of you
2 to voir dire Mr. Swope with regard to his
3 qualifications. Okay?

4 (Whereupon the bench conference was
5 concluded and the following proceedings were
6 held in open court.)

7 VOIR DIRE EXAMINATION

8 BY MR. TREZEVANT:

9 Q Mr. Swope, you are, I take it, an
10 instructor, correct?

11 A That's correct.

12 Q And your certification is actually a
13 substitute teacher, correct?

14 A Well, I'm an instructor for the State, a
15 substitute teacher for the county, which means that in
16 Broward County I'm allowed to actually go into a high
17 school. And before I can go into a high school where
18 the students are, I'd have to be a substitute teacher.

19 Q And as an instructor your certification
20 that you have, with a year to go, is a part-time
21 instructor; correct?

22 A Absolutely. I'm not a full-time
23 instructor.

24 Q Okay. All right. You're testifying
25 here today?

1 A Yes.

2 Q Okay. . . As to your education in the
3 Intoxalyzer 5000R?

4 A Yes.

5 Q You have essentially a drug technician's
6 license, correct?

7 A Correct.

8 Q I gather it is a technician in the State
9 of Florida, correct, that technician on the
10 Intoxalyzer 5000R?

11 A I would believe most of them have the
12 same type that I do now, correct.

13 Q Or higher, correct? I mean that is the
14 most basic level of the certificate, correct?

15 A Well, there are many areas of levels,
16 one would be an instructor, which I have although I'm
17 not an instructor on the Intoxalyzer 5000. It teaches
18 but that is signed off by somebody else.

19 Q That's the Intoxalyzer 5000R?

20 A Correct.

21 Q The permit you have involving that is
22 the lowest level that they have in the State of
23 Florida, correct?

24 A I don't know. I don't consider -- I
25 don't know what you mean by the lowest. It's the only

1 technician permit that there is.

2 Q And it's no different than any other
3 basic technician's permit for any other -- all the
4 technicians in Florida, that they all have the exact
5 same qualifications on the Intoxalyzer 5000R
6 permitwise, correct?

7 A Correct. If you're speaking of the
8 permit, that's absolutely correct.

9 Q All right.
10 You have a four-year degree, correct?

11 A Yes.

12 Q And what is that degree in?

13 A I have a four-year degree in criminal
14 justice from St. John's University.

15 Q Okay. Now, you have a four-year degree
16 in criminal justice. You've heard our officer testify
17 over here. He has a four-year degree in criminal
18 justice, correct?

19 A I didn't pay attention. If he said
20 that, then I don't know.

21 Q Okay. And you have -- you've gone
22 through the police academy somewhere else, correct,
23 Michigan or some place?

24 A I went through two police academies; one
25 in Michigan and one in Georgia.

1 Q And the one in Georgia, was that a full
2 police academy or was that when you moved to this
3 state and had to then get their interpretation and
4 their interpreting of the stuff that we use in this
5 state?

6 A The one in Georgia was a military police
7 academy. That was 12 weeks. I attended a 10 or a 15
8 week one later in this.

9 Q Yes. So you were an MP --

10 A Correct.

11 Q -- Military Police, and you went to
12 Michigan where you were an officer.

13 A Yes, sir.

14 Q And you were trained at the basic level
15 to be an officer, correct, in Michigan?

16 A At that time, yes.

17 Q Correct. Then you moved. At some point
18 you moved to Florida.

19 A 1984.

20 Q And when you moved to Florida you took
21 an 80-hour course, correct?

22 A I believe that's what it was, yes, sir.

23 Q To bring you up to scale in Florida law?

24 A Correct.

25 Q And at that point you have the same

1 qualifications as would a basic officer in Florida,
2 correct?

3 A At that point, yes.

4 Q Right. And the -- you heard -- I don't
5 know if you were here for our officers, but then he
6 went on and got an advanced course for becoming a DUI
7 specialist. And then did you have that also?

8 A Yes.

9 Q Yes, you did. Well, that involved --
10 would it be the same as our officer did except by you
11 though, correct?

12 A At that point, yes.

13 Q And it would be the same as any other
14 officer that has DUI -- that is on the DUI Task Force?

15 A That's correct.

16 Q Were you ever on a DUI Task Force?

17 A Yes.

18 Q And that was down in?

19 A Broward county.

20 Q And how long ago?

21 A I was on a task force for about a
22 year-and-a-half and then I was in charge of it,
23 administrative coordinator for probably
24 three-and-a-half to four years.

25 Q All right. In your studies -- your

1 criminal justice, correct?

2 A Yes.

3 Q Do you have an electrical engineering
4 degree?

5 A Electrical engineering?

6 Q Yes, sir.

7 A No. I've never done technological
8 engineering.

9 Q Do you have an electrical engineering
10 degree?

11 A No.

12 Q Do you have any degrees in, I believe it
13 is either gas chromatograph -- is that correct?

14 A Correct.

15 Q Do you have advanced studies in gas
16 chromatograph?

17 A No.

18 Q The Intoxalyzer 5000R, the underlying
19 theory, is any of that related to gas chromatography?

20 A No.

21 Q How is it related? How is it not
22 related?

23 A Well, gas chromatography would be
24 basically based on a blood sample, where a
25 toxicologist would handle that in the lab.

1 Q The entire 5000R?

2 A It works on a direct blood partition
3 ratio, correct, which means there's 2100 liters of air
4 is equal to one liter of blood.

5 Q And it has to do with -- it actually
6 measures it? How does it measure it?

7 A By infrared light.

8 Q Exactly. Do you study -- do you have
9 any degrees or specialized formal education from any
10 institutions that -- as far as -- do you have any
11 formal education regarding that?

12 A I have some education regarding the
13 Intoxalyzer which deals with the infrared theory put
14 on by infrared engineers.

15 Q Specifically have you gone to an
16 institution and studied that subject?

17 A No.

18 Q So then you have not?

19 A No. For that subject specifically, no.

20 Q And that's the most basic underlying
21 principle of the Intoxalyzer 5000R?

22 A Well, I don't know if I'd say it's the
23 most basic.

24 Q Well, other than the electrical
25 components, which you do not have a degree in,

1 correct?

2 A That's correct.

3 Q Okay. You've written several articles?

4 A Yes.

5 Q How many, to be exact, specifically and
6 over how long of a period of time?

7 A Well, I wrote two articles and I believe
8 the first ones I had published were in 1993. -I had
9 one published in 1994. And I've done training
10 outlines since, I guess, 1985.

11 Q So that would be four articles?

12 A Well, three articles actually.

13 Q Three?

14 A Three articles and I have published --
15 that were published, and I had training outlines.

16 Q But a total of three articles that were
17 published, correct?

18 A Correct. And then training outlines for
19 the State.

20 Q Those really aren't published, those
21 are --

22 THE COURT: Just exactly what are you
23 referring to? What specific articles and
24 training outlines did you write?

25 THE WITNESS: The articles regarding DUI

1 field sobriety testing, and the training
2 outlines encompass DUI training for officers in
3 the state. They require a number of hours in
4 what the course instruction is. And also
5 articles dealing with traffic accident
6 investigation and reconstruction.

7 BY MR. TREZEVANT:

8 Q And ninety percent of your work, and your
9 focus is on accident reconstruction, correct?

10 A That is correct.

11 MR. TREZEVANT: Your Honor, if I could
12 please have a second.

13 Your Honor, State has no further
14 questions of this witness.

15 THE COURT: Let me -- members of the
16 jury, I need to talk to counsel outside your
17 presence, so we're going to be recessing just
18 briefly for about five minutes. Okay?

19 Again, please don't come in until the
20 bailiff brings you in. You're excused at this
21 time.

22 (Whereupon the jury exited the
23 courtroom.)

24 THE COURT: Mr. Swope, you're also
25 excused for a short recess. Thank you.

1 (Whereupon the witness exited the
2 courtroom.)

3 THE COURT: Let me hear from each of you
4 regarding whether or not Mr. Swope is going to
5 be declared as an expert in the field sobriety
6 testing.

7 But first from you, Mr. Gilbert.

8 MR. GILBERT: Your Honor, it's clear
9 that Mr. Swope has specialized knowledge that
10 can assist the jury in the training and
11 Mr. Swope has tried to explain here what he has
12 to offer with regard to that, not just that he
13 has specialized, but he has specialized as an
14 officer, and he can inform the jury of that.

15 THE COURT: Okay.

16 MR. TREZEVANT: Your Honor, he indicated
17 he has testified 250 times as an expert and/or
18 officer. They may do it different down where
19 he is, but it's obvious that in court there's
20 officers, but, yes, he said as an officer.
21 That's not what he's trying to do in this
22 courtroom.

23 THE COURT: You're saying he's testified
24 250 times as an expert while he was an officer?

25 MR. TREZEVANT: He said he -- I believe

1 she --

2 THE COURT REPORTER: Shelly.

3 MR. TREZEVANT: -- could back it up and
4 indicate -- and she could read back. And if
5 he --

6 THE COURT: That he testified today that
7 he has testified previously as an expert 250
8 times, but he did it as an officer those times?

9 MR. TREZEVANT: Right after that, Judge,
10 he indicated that most of those were as an
11 officer. I believe that's what he said.

12 MR. GILBERT: Your Honor, could we have
13 the record read back?

14 MR. TREZEVANT: Yeah.

15 THE COURT: I didn't hear that, if
16 that's what he said.

17 MR. TREZEVANT: I think he did, Your
18 Honor.

19 THE COURT: All right. If you can find
20 that, Shelly.

21 (Brief pause.)

22 THE COURT REPORTER: "Question: How
23 many times" --

24 THE COURT: It's before that.

25 THE COURT REPORTER: "Mr. Swope, are you

1 charging for your services today?"

2 Answer: "Yes."

3 "In effect for your testimony today?"

4 "No."

5 "How many times have you been heard as
6 an expert witness in court?"

7 Answer: "In criminal cases I've been
8 heard about 250 times related to DUI matters."

9 Question: "That's either as an expert
10 or in private practice?"

11 His answer is: "And I have testified
12 about 105 to 110 times as an accident
13 reconstruction. And that's all -- it's been
14 since 1974."

15 And the question is: "Have you
16 testified solely for the defense or for the
17 State?"

18 Answer: "No."

19 THE COURT: Do you have that on tape?

20 THE COURT REPORTER: Yeah, let me go
21 back.

22 (Brief pause.)

23 (Whereupon a cassette recording of the
24 requested testimony was played.)

25 MR. TREZEVANT: Since 1974 he's been an

1 officer, so the bulk of that is all as an
2 officer, because after he became -- after he
3 quit being an officer, he began being a traffic
4 reconstruction -- traffic reconstruction
5 expert, which is ninety percent of his time.

6 So the -- I don't know that that carries
7 a tremendous amount of weight. As far as
8 his -- he says he's publishing articles in
9 publications. I believe there's one
10 publication, maybe two publications. One
11 publication he -- well, I've seen one
12 publication.

13 THE COURT: You've seen a publication by
14 him?

15 MR. TREZEVANT: As far as his special
16 training, his criminal justice degree would
17 certainly be contrary to the Intoxalyzer 5000R.
18 He has no degree in electrical engineering. He
19 has no special training; I thoroughly asked him
20 that. Formal training at any educational
21 institution regarding the -- how the
22 Intoxalyzer 5000R, the infrared light works.
23 He has none.

24 And he's going to come in here and
25 basically testify as an expert. I don't see

1 how in the world he has the specialized
2 knowledge of an expert regarding field sobriety
3 tests. I mean he has essentially the same
4 permit -- no permits were offered in court at
5 all and -- by the defense. He has -- what he
6 did essentially have, from what he testified
7 to, the same permit as, you know, all the
8 people that come in here, breath tests.

9 And that's certainly not akin to a
10 specialized expertise that would raise him to
11 that testifying level, to come into court and
12 testify as to the inner workings of the
13 Intoxalyzer 5000R. I believe they're not
14 allowed to even do any maintenance or go really
15 into the machine and work on it at all.

16 He has no -- if you want to give a
17 sobriety test, certainly the State would first
18 object to any testimony regarding field
19 sobriety tests regarding him being an expert
20 any way, and if he -- and certainly as to his
21 wealth of expertise, he has no more than the
22 officer who testified earlier, which is not an
23 expert. We could ask the State to call in 50
24 officers and the defense could call in 52
25 officers and it would be, you know, the same

1 pot.

2 THE COURT: Let's divide this argument
3 up. I'm not asking you to give an opinion. In
4 all candor, it wasn't clear to me from his
5 testimony. It's clear to me from his testimony
6 that he thought, or I don't know if -- that
7 he's authored articles. It's not clear to me
8 what his knowledge goes to, as the saying is,
9 other than the fact that he has a four-year
10 degree from a college or university in criminal
11 justice.

12 I would agree that if that can be left
13 in the light alone it is not sufficient to make
14 him an expert.

15 If he's got any specialized knowledge
16 during the training there hasn't been anything
17 at issue regarding that to date.

18 MR. GILBERT: Your Honor, if we could,
19 we could just have Mr. Swope come back in here
20 and we could just ask him that.

21 THE COURT: Outside the presence of the
22 jury.

23 All right, ask Mr. Swope to come back in
24 here.

25 (Mr. Swope entered the courtroom.)

1 THE COURT: Mr. Swope, thank you. Once
2 again, please, you may take your seat.

3 Mr. Gilbert?

4 MR. GILBERT: Thank you, Your Honor.

5 Mr. Swope, again, how do you know --
6 what do you know about the Intoxalyzer machine?
7 Where did you find your knowledge as to the
8 Intoxalyzer machine?

9 THE WITNESS: Well, I initially started
10 acquiring it in 1985 in Broward County with the
11 amount of tests that I actually administered
12 when the Intoxalyzer was put into effect. We
13 were asked to evaluate the initial -- at that
14 time the 64 series with other series that were
15 in use.

16 THE COURT: You're saying you did this
17 with the Broward --

18 THE WITNESS: Broward Sheriff's, yes,
19 ma'am. Myself and Dave Brias (phonetic) and
20 another guy named Dennis Hamilton (phonetic).
21 And at that time we worked, all three of us
22 together, and we were taking the 5000 and
23 testing that with the 900 and 4011 and also the
24 RDT3. At that time the State had, I think, six
25 or seven instruments that were approved at that

1 time.

2 THE COURT: What were you testing for?

3 THE WITNESS: We were testing to see how
4 accurate the 5000 was versus the models that
5 were already in use in the state.

6 THE COURT: How did you do this? Did
7 you have one person blow into all six
8 machines --

9 THE WITNESS: No.

10 THE COURT: -- and then compare the
11 results?

12 THE WITNESS: No. Initially we were
13 using simulators, machines that we would -- we
14 had an ethanol mix and we'd use it to simulate.
15 And then we would use our own blows. And we
16 would have individuals that were arrested for
17 DUI, they were still using the 4011 but then
18 they would blow into the 5000 as well. All of
19 the results were then packaged, wrapped up and
20 then sent up to James Mann (phonetic) and
21 eventually at that time

22 THE COURT: Okay.

23 THE WITNESS: I was also present for
24 three or four blood and breath correlations. I
25 also conducted two myself where individuals

1 were brought in, given measured amounts of
2 alcohol, and at the same time that they would
3 blow into the machine, they would also give
4 blood samples. Those blood samples were then
5 taken to the Broward Medical Examiner's Office
6 and analyzed along with the breath samples.

7 MR. GILBERT: So these are correlated
8 studies that you did --

9 THE WITNESS: Yes.

10 MR. GILBERT: -- is that correct?

11 THE WITNESS: Yes. They're -- well,
12 actually they're correlation studies.

13 MR. GILBERT: Correlation studies.

14 THE WITNESS: Yes.

15 MR. GILBERT: And --

16 THE COURT: Did he test these himself or
17 did he --

18 THE WITNESS: No, I did not.

19 THE COURT: -- assist in compiling the
20 data?

21 THE WITNESS: I assisted in three
22 studies in compiling the data. And I did -- I
23 did two studies myself and I was present --
24 this is while I was at the Sheriff's Office. I
25 have been present at two other blood/breath

1 correlation studies conducted since then.

2 THE COURT: Okay.

3 THE WITNESS: I also went through the
4 factory. At that time it was in Colorado. And
5 toured the factory and observed how the machine
6 was made and such things. All the machines
7 were analyzed and correlated and come back to
8 the factory for repairs.

9 Then in 1990, '90, '91, when I left the
10 Broward Sheriff's Office, I began to conduct my
11 own experiment with the machines, either at the
12 college where I helped to maintain four, and
13 again those accounts were individuals, we give
14 them measured amounts of alcohol and then the
15 blood. And we correlated them with field
16 sobriety tests and I evaluated how individuals
17 did, like were on a certain level with the
18 machine.

19 MR. GILBERT: In terms of the 5000R?

20 THE WITNESS: Correct. Well, actually
21 the 5000 and 5000R are the same model, it's
22 just a different chip.

23 MR. GILBERT: Oh, it's a different chip?

24 THE WITNESS: Yes. The 64 and 66 series
25 were virtually identical.