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

STATE OF FLORIDA,

Plaintiff,

v.

RICHARD MISSALL,

Defendant.

Case No.98-08511MM10

JUDGE LISA G. TRACHMAN

Broward County Courthouse
Fort Lauderdale, Florida
May 11, 1999
9:15 a.m.

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17TH JUDICIAL CIRCUIT

EXCERPT OF PROCEEDINGS
TESTIMONY OF RICK SWOPE

The above-entitled case came on for trial
before the Honorable LISA G. TRACHMAN, Presiding Judge,
at Broward County Courthouse, Fort Lauderdale, Florida,
on the 11th day of May, 1999, at 9:15 a.m.

A P P E A R A N C E S:

MICHAEL J. SATZ, STATE ATTORNEY
By: JENNIFER MERKLE, ASSISTANT STATE ATTORNEY,
appearing on behalf of the State.

ROBERT MALOVE, ESQ.,
appearing on behalf of the Defendant.

1 Thereupon,

2 The following proceedings were had:

3 THE COURT: Counsel, call your first
4 witness.

5 MR. MALOVE: At this time the defense would
6 call Rick Swope.

7 Thereupon,

8 RICK SWOPE,
9 having been first duly sworn, testified under oath as
10 follows:

11 THE CLERK: State your name for the record
12 and spell your last name.

13 THE WITNESS: Rich Swope, S-W-O-P-E.

14 THE CLERK: Please be seated.

15 DIRECT EXAMINATION

16 (BY MR. MALOVE) Good morning.

17 A Good morning.

18 Q Please introduce yourself to the jury.

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

20 Q Mr. Swope, what do you do?

21 A Well, I do primarily accident
22 reconstruction. I have a company that reconstructs
23 mainly fatal or serious injury traffic accidents. We
24 do animations and we do the reconstruction of the
25 accident. That's the primary point of my business.

1 In ten percent of my business, I deal with
2 breath testing. I do experimentations with breath
3 testing devices. I also maintain machines for private
4 industry, and I also maintain the machine for Florida
5 International University. They receive some time type
6 of grant - I don't know whether it's federal or state
7 - to do experiments on the breath testing machine.

8 I also work with a group of people that are
9 scattered around the country and we do
10 experimentations with the Intoxilyzer and other breath
11 testing devices, but my primary focus is the
12 Intoxilyzer. We work with that machine, and,
13 basically, I learn what works and what doesn't work,
14 and what is good and what is bad, and that is
15 basically what I do.

16 Q Are you charging today for your services?

17 A Yes.

18 Q Will that affect your opinion on your
19 testimony?

20 A No.

21 Q What is your educational background?

22 A Well, I have a Bachelor's Degree in Criminal
23 Justice from Saint Thomas University. I have a Master
24 of Science Degree in Technology and Engineering from
25 the University of Miami. I was a police officer for

1 fifteen years.

2 Q Where were you a police officer?

3 A Well, the last six years I was with the
4 Broward County Sheriff's Office. I was the
5 administrative coordinator for six years at the D.U.I.
6 Task Force and Traffic Homicide Unit. I worked with
7 the breath testing devices and the video tape at the
8 B.A.T. mobile breath alcohol testing facility. I
9 wrote -- Well, at that time - I don't know if there
10 has been some changes. I'm sure there has - but, at
11 that time, I wrote all of the standards for the breath
12 testing and alcohol division.

13 Q What was the manual that you prepared?

14 A Right. It was manual; it was called - I
15 don't know the terminology - but I think it was called
16 "Combined Accreditation." The Sheriff's Office was
17 accredited in probably 1987, and we all had to write
18 manuals based on our theories that we had.

19 Q Have you ever taught any classes?

20 A Sure, a lot.

21 Q Where do you teach?

22 A Well, I'm certified to teach in the state of
23 Florida by the Criminal Justice Standards in Training
24 Commission. I can teach in any police academy;
25 because of my degree, I can also teach in colleges if

1 I wish to, although I have not. I don't teach
2 normally at colleges; I teach seminars. I taught
3 probably 40 or 50 seminars on breath testing and
4 accident reconstruction in the past ten years; I've
5 taught for the Bar, like, the Florida Bar and the
6 Illinois Bar and the Ohio Bar and all around the
7 country; I've taught at a lot of Bar Associations;
8 I've taught judges, defense attorneys, although a lot
9 of the seminars have been related to defense.

10 Q Do you belong to any professional
11 associations?

12 A Yes.

13 Q Can you name a few?

14 A I belong to the Society of Automotive
15 Engineers; The International Association of Accident
16 Reconstructionists; The International Association of
17 Management and Technology, and that is basically a
18 worldwide group that deals with technologies and
19 development of new products and those types of things.

20 Q In order to stay current in the field, do
21 you attend any seminars?

22 A Yes.

23 Q How often?

24 A It varies. I probably attend a minimum of
25 two seminars a year, or two classes a year depending

1 on what group is giving it. I usually lecture
2 probably three to five times a year. And, of course,
3 when you lecture, you pretty much have to stay current
4 with what is going on because that is what you do.

5 Q Have you published any articles?

6 A Yes.

7 Q How many?

8 A I have published five articles, and I've
9 assisted in publishing others. In other words, an
10 attorney did a book, and I wrote two chapters in his
11 book for him in a vehicular homicide book. And I've
12 also done training outlines for the State; I have
13 probably done 15 or 20 of those.

14 Q Have you ever testified as an expert witness
15 in the past?

16 A Yes.

17 Q In what fields have you testified as an
18 expert witness?

19 A Well, primarily, either accident
20 reconstruction or breath testing and field exercises.

21 Q How many times would you estimate that
22 you've been declared an expert in court?

23 A Well, I get asked that all the time. I'm
24 trying to get that together, but it's somewhere
25 approaching a thousand times. I try to get closer all

1 the time, and go back through all of my files, but
2 it's getting close to a thousand. I testify roughly
3 70 times per year, and that's pretty steady.

4 Q Do you testify solely for the defense?

5 A No, I do primarily, but I have not testified
6 solely for the defense, no.

7 Q Have you testified for the State?

8 A Yes.

9 Q What would you say the percentage is between
10 them, when you say you testify primarily for the
11 defense?

12 A Well, in a case such as this, in breath
13 testing cases, I primarily testify for the defense,
14 because the State has their own people. They don't go
15 outside and hire people to testify in breath testing
16 cases; they have their own people on staff. I do a
17 lot of defense work for governmental agencies,
18 primarily with accidents or where they have employees
19 involved in alcohol related incidents where they are
20 driving county or city vehicles.

21 Q Are you familiar with the Intoxilyzer five
22 thousand?

23 A Yes.

24 Q Are you familiar with the Intoxilyzer five
25 thousand-R?

1 A Yes.

2 Q What is the difference between the five
3 thousand and the five thousand-R?

4 MS. MERKLE: Objection, Your Honor. I don't
5 think he is qualified at this point to testify.

6 THE COURT: Overruled.

7 (BY MR. MALOVE) Let me come back to that question
8 later.

9 Judge, at this time, I'd like to ask the
10 Court to allow Mr. Swope to testify in the area of his
11 expertise, being the Intoxilyzer five thousand and
12 five thousand-R, field sobriety exercises, and the
13 maintenance of the instrument.

14 MS. MERKLE: The State would object as to
15 the first and third grounds and as to the second,
16 Your Honor, we believe subject to the motion,
17 that we would ask to voir dire.

18 THE COURT: Go ahead and voir dire him.

19 VOIR DIRE EXAMINATION

20 (BY MS. MERKLE) Good morning.

21 A Good morning.

22 Q I just want to go back over some of the
23 testimony that you just gave about your
24 qualifications.

25 A Right.

1 Q Generally, would you agree that somebody's
2 memory is better at the time of an event than it is,
3 perhaps, some time after?

4 A Probably, in most cases I would say, yes.

5 Q You said that you had a Master's Degree in
6 Science and Technology?

7 A It is a Master's of Science Degree in
8 Investigative Technology and Engineering from the
9 University of Miami.

10 Q When did you obtain that?

11 A December of 1995.

12 Q Could you explain for us some of the courses
13 that you took?

14 A Well, some of the courses that I took were
15 statistical analysis. There was six industrial
16 engineering courses that dealt with statistics and
17 mathematical equations dealing with productions. We
18 had a lot of writing courses, obviously, because part
19 of the preparation that we had to do was to prepare
20 papers on how to run companies and how to do
21 industrial studies. I don't know, obviously, each
22 class, I'd have to look at that, but that's what I
23 remember off of the top of my head. It's been a few
24 years.

25 Q You indicated that a lot of this was to deal

1 with how to run companies and do analysis. What was
2 your specialization when you got your degree?

3 A I don't know what you mean by
4 specialization.

5 Q Well, is it a degree in science and
6 technology and that's it? It's just a broad category,
7 or do you specialize?

8 A No, it's a broad category. In other words,
9 what their doing is, these courses are now really
10 designed for the twenty-first century. Engineering,
11 in other words, is meant to encompass a variety of
12 things and that is really what the courses cover.

13 Q So in your particular case, didn't it really
14 involve, like, companies and offices and how to run
15 companies and offices?

16 A A lot of that was, sure, because the problem
17 is - I really shouldn't say problem - but the
18 production, statistical analysis, and things like that
19 dealing with productions. We just happened to use
20 companies. You could use, I guess, whatever you
21 wanted to use. In my field I chose companies.

22 Q Productions of what?

23 A Materials, components, how to design, how to
24 design research and development. A lot of it was
25 research and development and how to research and

1 develop things, and the main purpose I took that for
2 was, obviously, the studies that I do on machines and
3 technology. In other words, like the Intoxilyzer. If
4 I test something 50 times and it works 48, what does
5 that mean? So a lot of that dealt with research and
6 development.

7 Q So during the course, did you take any
8 courses dealing with research and development?

9 A I think most of the courses dealt with
10 research and development, yes.

11 Q And you said statistics?

12 A The statistics is a part of that as well.

13 Q What were you researching and developing in
14 that case?

15 A Whatever we chose. We were allowed to
16 chose, basically, either to research a company or to
17 design a company. I think in a couple of my courses I
18 actually designed companies.

19 Q So you weren't actually being taught
20 statistical analysis?

21 A Well, sure you were. Absolutely. You can't
22 do it unless you're taught. You were taught analysis
23 and how to develop it, and how to apply certain
24 mathematical formulas to arrive at certain answers.
25 It was a lot of formula work.

1 Q And who was your professor, do you know?

2 A The one I remember off the top of my head
3 was Callio (phonetic). I remember that.

4 Q Do you remember what he was specializing in?

5 A No, I don't. I think he was an industrial
6 engineer, but I'm really not sure.

7 Q And you say that during the course of these
8 statistics classes, you remember, in fact, not just
9 learning mathematical computations, but this
10 statistics teacher was teaching you how to develop and
11 form and produce items and productions?

12 A Sure, that was part of the project. We
13 decided on each project exactly what we were going to
14 do.

15 Q Well, what were some of things that you did?

16 A Well, I think I developed a company; I think
17 I developed a company internationally as one of my
18 papers; I think we were required in one course to use
19 a company in place, I think maybe Sony or something
20 like that - it's been several years, so I don't
21 remember exactly what companies we used; we were given
22 assignments and sometimes we worked alone and
23 sometimes in groups, and then we had to prepare that
24 product and we had to come up with finances. In other
25 words, how much it would cost to do a project in

1 developing and research. I used the Intoxilyzer in
2 one of my research cases, and if we were going to
3 develop the Intoxilyzer, how much it would cost and --

4 Q You're saying if we were going to. I mean,
5 when you were in class, when you were in school, did
6 you try to develop the Intoxilyzer?

7 A Yes.

8 Q You did?

9 A Yes.

10 Q What class was that?

11 A I don't remember.

12 Q You don't remember.

13 A Ma'am, I don't remember the class number, I
14 mean, this has been four years.

15 Q The class that you were taking, where you
16 did work that you're basing your testimony on here
17 today, is kind of significant, don't you think?

18 A No, I don't think that what I did several
19 years ago is significant. I don't remember the class
20 that I took at that time. It could be one of twelve
21 classes. If you have a list, I can look through it
22 and see if I can help you.

23 Q Do you have a curriculum vitae with you?

24 A No. Your office has a million. I've sent
25 them probably 50; I don't keep sending them every

1 week.

2 Q So what you did of couple of years ago just
3 really isn't important? That research that you did on
4 the Intoxilyzer at the time isn't significant; is that
5 what you said?

6 A I don't think for this type of testimony,
7 no.

8 Q Okay.

9 A I don't think that it is that significant,
10 no.

11 Q Okay. Now you said that approximately ten
12 percent of your business deals with breath testing?

13 A Right.

14 Q And experimentation?

15 A Right.

16 Q Approximately how much of your income comes
17 from the breath testing and experimentation?

18 A I don't know. The income from that comes
19 probably - and this is just an estimate - probably
20 around, maybe, forty or fifty thousand dollars of
21 income a year comes to my company from that. And,
22 again, I'm just giving that figure without knowing
23 exactly, but somewhere around in that area.

24 Q You said that you maintain machines for
25 private industry and for FIU?

1 A That's correct.

2 Q Are you currently certified to maintain
3 these machines by FDLE?

4 A No, I wouldn't be and there is no
5 certification. The only certification that people
6 have is if they are in law enforcement and are going
7 to give testing for criminal. In other words, no
8 operator in the state of Florida has company
9 certification because there is none.

10 Q So, in fact, you couldn't now, at this time,
11 give someone a breath test or maintain a breath
12 instrument being used in criminal cases, right?

13 A No, no one can, again, unless they are in
14 law enforcement. You can not do that in the state of
15 Florida and that's the rules.

16 Q Because, in fact, you don't meet the strict
17 requirements that are required by FDLE to maintain the
18 machine for FDLE; is that correct?

19 A No, you used the word strict; the state of
20 Florida does not have strict requirements. My machine
21 would never pass. In other words, your machine would
22 never pass an experiment that we use at FIU, because
23 it doesn't meet the requirements of the scientific
24 community.

25 Q So you don't even use the same maintenance

1 procedures; is that what you're saying?

2 A No, because they are inferior. Why would I
3 use something inferior when we're doing testing for
4 articles that are scientifically based and related to
5 a machine that has not met the standards?

6 Q Let me ask you, did you ever take any
7 physiology courses?

8 A With the exception of what we're taught in
9 breath testing school and breath testing seminars, not
10 on a college level; just what they give on breath
11 testing to breath testing people.

12 Q Have you had any type of anatomy courses?

13 A No.

14 Q Have you had any chemistry courses?

15 A I think had a chemistry course in high
16 school, but no college related chemistry course as I
17 recall.

18 Q And you've already said that the experience
19 you had with the Intoxilyzer was of no importance;
20 right?

21 A No, I didn't say that. I said that the
22 experiments that I did in class on the paper that was
23 not published and that was just meant for class, is
24 not important to my testimony today; as to how many
25 Intoxilyzers to produce, no, I don't think is

1 important.

2 Q Oh, so that was only on how many to produce.
3 You weren't actually producing the Intoxilyzer?

4 A We were producing it on what is called a
5 false. In other words, it was not something that we
6 used, it was something that we made up.

7 Q So you were designing a company, you weren't
8 designing the Intoxilyzer; is that correct?

9 A No, that's not correct.

10 Q You designed the actual machine?

11 A No.

12 Q Then what did you do?

13 A We designed how the machine would be built
14 and produced, and it was not peer reviewed. It was
15 just something for class, because we were attempting
16 to do as much as we could in a six week course. It's
17 difficult - you can't design something like this in
18 six weeks because it would, obviously, take you
19 probably a couple of years to design. So we had to do
20 it very quickly, which is why I did not submit the
21 article for peer review, because we did it for class
22 purposes only.

23 Q So when you testified earlier that you
24 designed the Intoxilyzer, that was not correct?

25 A No, I did design one. The fact is, I did

1 not design one for peer review, because we had to do
2 it in a six week course.

3 Q You just said to me that you designed the
4 production --

5 A Exactly.

6 Q -- and the company, but you didn't design
7 the actual machine?

8 A No. Yes, we did.

9 Q You did design the actual machine?

10 A We designed an actual --

11 Q Then why did you say that you didn't have
12 enough time during that six week course to design the
13 actual machine if you did, in fact, do that?

14 A Apparently you're missing something that I
15 said, because I don't understand your question at all.

16 Q Okay. I'm just trying to understand --

17 THE COURT: Let's move on.

18 (BY MS. MERKLE) How much do you charge for your
19 services?

20 A For this type of case, I charge \$125 per
21 hour, and for reconstruction services I charge up to
22 \$250 an hour.

23 Q Don't you have a retainer fee that you
24 charge?

25 A Yes, I charge a \$500 retainer and I bill

1 from that which is four hours. In other words,
2 whatever it takes me to prepare for the case and come
3 into court and testify. That's just a fee; if it's
4 less than that, it's nonrefundable; if it's more than
5 that, I bill for the additional hours.

6 Q So at least \$500, plus.

7 A Yes.

8 Q Possibly?

9 A Yes.

10 Q Now, you said that you were a police officer
11 for 15 years?

12 A That's correct.

13 Q And you were with BSO for six?

14 A Yes.

15 Q Where were you before that?

16 A For which time?

17 Q Before you were with BSO?

18 A I was with the Monroe City Police Department
19 in Monroe, Michigan, from 1978 to 1984.

20 Q What city did you say?

21 A Monroe, Michigan.

22 Q How do you spell that?

23 A M-O-N-R-O-E.

24 Q From 1978 to 1984?

25 A I was hired in '78, but I think I started in

1 January of '79.

2 Q And where did you work prior to that?

3 A I was in the military police in the United
4 States Army from 1974 to 1977.

5 Q What did you do for those two years in
6 between?

7 A Actually, the first six months I don't think
8 I did anything. I had early out from the military, so
9 I was actually being paid for that time, and then I
10 worked in a factory in Monroe, Michigan, until the
11 police job came through. I took the test and I passed
12 and I think it took a year to get hired or something
13 like that.

14 Q In fact, you were a laborer in a papermill;
15 is that correct?

16 A Yeah, I did forklift driving and things like
17 that, yes.

18 Q Now when you were in the military, when you
19 first got into the military, what did you do?

20 A Well, I went to basic training.

21 Q Where did you go from basic training?

22 A I went to military police school.

23 Q How long did that take?

24 A I don't know, 8 or 12 weeks. I'm not sure.

25 Q And from there where did you go?

1 A I went to Fort Raleigh, Kansas, where I was
2 stationed for the remainder of my career.

3 Q And when you were at Fort Raleigh, Kansas,
4 do you recall what your responsibilities were?

5 A Which time?

6 Q When you arrived there?

7 A When I arrived there, the first thing I did,
8 I believe, is I worked in the administrative section
9 of the S1 division.

10 Q Weren't you working in personnel at that
11 time?

12 A No.

13 Q You weren't?

14 A I don't believe that I was in personnel at
15 that time, no. I was working in the S1 division.

16 Q Well, what were your responsibilities?

17 A That was 15 years ago, I don't recall
18 exactly the order. I know I worked in personnel at
19 one time; I worked the road for a period of time; I
20 assisted administratively in the jail for a period of
21 time, we had a stockade there; and then I worked as a
22 sergeant in charge of the personnel in the military
23 police division at the 207MP company.

24 Q How long were you on the road?

25 A Well, off and on; it depends. I might have

1 been on the road two days a week, sometimes one day a
2 week, sometimes no days a week, and sometimes five
3 days a week. It would depend on what my
4 responsibilities were and what my job was and who I
5 was overseeing during that period of time.

6 Q When you say you were on the road, you're
7 referring to your performance of your administrative
8 functions that you mentioned at that time?

9 A No.

10 Q What were you referring to?

11 A I'm referring to traffic; I'm referring to
12 breath testing. We were taught --

13 Q So who were you taught by to do this breath
14 testing?

15 A I believe I was taught by the Kansas Highway
16 Patrol - I believe.

17 Q And who did you perform these breath tests
18 on?

19 A Obviously, military personnel.

20 Q For what purpose?

21 A For the purpose of them being placed under
22 arrest for operating a vehicle under the influence on
23 post.

24 Q And when you were a sergeant, what were your
25 responsibilities?

1 A Well, my responsibilities - I believe, I had
2 up to 20 people under me, depending on various points
3 in time, and my responsibilities were to assign people
4 that were coming into the division. I handled the
5 716MP company.

6 Q Isn't it true that your primary
7 responsibility was battalion correspondence?

8 A Certainly that was one of the things. I was
9 in charge of anything that came into the battalion.
10 In other words, I was responsible for assigning
11 people; I assigned MPs to different divisions. I
12 think we had five different MP companies in that
13 division, if I'm not mistaken.

14 Q How do you assign the people that you dealt
15 with as far as correspondence?

16 A Well, to assign people, you have to have
17 correspondence. You have to write to people to get
18 people from point A to point B. That's the way the
19 military works.

20 Q Supervising that many people and having all
21 of that responsibility is pretty significant, wouldn't
22 you say?

23 A That depends on the number of people I have,
24 yes.

25 Q Did you find that experience to be

1 significant?

2 A Sure. I think any experience is
3 significant, yes.

4 Q And the fact of doing the breath testing in
5 1974, that is pretty significant, at least to the
6 purpose of what we are here for today?

7 A I depends on what you think is significant.
8 I don't know.

9 Q Okay. Well, was your experience with
10 performing these breath tests sufficient for you to
11 feel that you are competent to testify here today?

12 A I'm sure that's the first part; I've got
13 training. That's the first time I looked at breath
14 tests, yes.

15 Q So would you say that that is a significant
16 part of your experience?

17 A It is a part of the experience, yes.

18 Q Are you qualified to be here today?

19 A That's up to the judge and jury to
20 determine.

21 MS. MERKLE: Okay. Your Honor, may I
22 approach the witness.

23 THE COURT: All right.

24 (BY MS. MERKLE) Mr. Swope, do you recognize that
25 document?