

IN THE COUNTY COURT IN AND
FOR DADE COUNTY, FLORIDA

TRAFFIC DIVISION

CASE NO. 80724 WD

STATE OF FLORIDA,
Plaintiff,

vs.

EDGARD PIERRE,
Defendant.

E X C E R P T

The above-entitled case came on for hearing before the
Honorable LOREE SCHWARTZ FEILER, Judge of the above-styled
Court at the Richard E. Gerstein Justice Building, 1351 N.W.
12th Street, Miami, Florida, on Tuesday, September 21, 1993
commencing at or about 9:00 a.m.

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
By: MICHAEL GILFARB
Assistant State Attorney
1350 N.W. 12th Avenue
Miami, Florida 33125
On behalf of the State of Florida.

DAVID RABEN, P.A.
By: DAVID RABEN, ESQUIRE
Miami, Florida
On behalf of the Defendant.

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CROSS EXAMINATION

BY MR. GILFARB:

Q Members of the jury, can you see the witness okay?

Good afternoon, Mr. Swope.

A Good afternoon.

Q It's a pleasure to finally meet you. Mr. Swope, before we get into the Intoxilyzer and your retrograde extrapolation, I would like to talk you about some comments you just made on direct examination concerning field sobriety tests.

A Yes, sir.

Q Obviously, if you don't understand any of the questions, please ask me to rephrase and I will rephrase them.

A I will.

Q You used to be a police officer; is that correct?

A That's correct.

Q And at one time, you were out on the streets actually making DUI arrests; isn't that true?

A That's correct.

Q And that was in --

A Well, actually the three departments. I was counting the Army.

Q You were actually out there in your patrol car.

1 You'd see somebody who you'd have a reasonable suspicion to
2 stop, you may have reason to conduct the DUI investigation
3 and determine you have probable cause to make a DUI arrest?

4 A That's correct.

5 Q Okay. And you have made DUI arrests in the past;
6 is that correct?

7 A That's true.

8 Q Approximately how many DUI arrests have you made?

9 A Probably over a thousand in 15 years.

10 Q And of those thousands of DUI arrests, have you
11 testified on behalf of the State in a trial?

12 A Certainly.

13 Q Okay. And you have testified to your having
14 conducted field sobriety examinations at the side of the
15 road?

16 A Absolutely.

17 Q So you have used these tests before?

18 A Yes, I have..

19 Q But it's your contention here today that unless
20 the tests are performed in a certain way, that you would not
21 have a valid result?

22 A That's correct. If the tests are not performed
23 properly, you cannot score them or have a proper result.
24 That is correct.

25 Q You have given an opinion in this case based upon

1 the hypothetical posed to you by Mr. Raben? In this case,
2 the fact analogous to this case, you have read the A form;
3 haven't you?

4 A Yes, I have.

5 Q So you knew that he was talking about this case?

6 A I believe he was, yes.

7 Q And so you have formed an opinion concerning this
8 case and the field sobriety examination?

9 A I have looked at the tests; yes.

10 Q And you have expressed to the jury your opinions
11 concerning these field sobriety examinations; isn't that
12 true?

13 A No, I have not.

14 Q Isn't it true that on direct examination you told
15 this jury that under the certain circumstances enumerated by
16 Mr. Raben that you would say the defendant did not fail the
17 examination and therefore would not make a DUI arrest.

18 Isn't that what you said?

19 A I don't recall saying that, but --

20 THE COURT: Let him finish his answer.

21 THE WITNESS: What I recall saying is that he gave
22 me a situation and I answered I would not continue on
23 with the roadsides. He gave me a situation and I
24 answered the question.

25 BY MR. GILFARB:

1 Q As a point for clarification for the jury, will
2 you please recall for us today, right now, what examinations
3 are. What were the circumstances given in which you
4 responded that in your opinion, the defendant did not fail
5 right now?

6 A The question he gave me first of all on the walk,
7 I'm sorry, the one legged stand test was if an individual
8 puts his foot down once, 27 seconds, is that a failure? My
9 answer was no, that is not a failure.

10 The walk and turn test, walk the line test. He
11 asked me if an improper pivot, where a guy makes an improper
12 pivot, turn, if that is cause for failure. My answer was
13 no. It's not -- my answer is still the same.

14 Two times it was before that.

15 Q Thank you.

16 Now, that opinion was based upon those facts that
17 you were just given?

18 A That's absolutely correct.

19 Q Your opinion might change if the facts change?

20 A Whatever facts you give me for a hypothetical or
21 other facts I have, I'll answer it.

22 Q Then I will give you a hypothetical. Let's say
23 you were driving down the road and you observed a car facing
24 in the opposite direction of traffic. That is, the car is
25 stopped facing oncoming traffic.

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1 You observed that. You observed an improper turn
2 and you observed running of a red light with no braking
3 applied. Let's say 15 miles an hour, going right through a
4 stop sign.

5 Let's say you see that.

6 MR. RABEN: Objection; form of the hypothetical.
7 That's not consistent with the facts of this case.
8 There is no improper turn and no running of a red
9 light.

10 THE COURT: Overruled.

11 BY MR. GILFARB:

12 Q Let's say then upon effecting a stop -- first of
13 all, would you agree with us today that that would certainly
14 rise to a level of reasonable suspicion for a stop?

15 A I would agree with that; yes.

16 Q Now, you make your stop. You get to the car and
17 you notice, in your opinion, that the defendant gets out of
18 the car and is a little bit unsteady. You conduct field
19 sobriety examinations. The defendant or the subject, who
20 you are testing, is doing a one legged stand pursuant to
21 your instructions, drops his foot down on number 27 of the
22 30 counts. And also, does not estimate or does not --
23 strike that.

24 He performs the test by placing his foot down
25 once, okay, at the 27 mark.

1 A Yes.

2 Q You then proceed to give him the balance test.

3 And in the balance test, you observe --

4 MR. RABEN: Excuse me, sir. I didn't mean to cut
5 you off. That was just that question?

6 MR. GILFARB: You will have your chance on
7 redirect.

8 BY MR. GILFARB:

9 Q Now, when you give the balance test, you observe,
10 according to what you see from the way he is standing there,
11 a six inch sway. You have observed that; okay?

12 That's the next test. Then you also observe on
13 the walk the line test, not just an improper turn, but isn't
14 part of the instructions also to walk heel to toe?

15 A That is correct.

16 Q Let's pose then on this test that he also didn't
17 walk heel to toe and made a pivot in such a way he almost
18 fell over. Is your testimony today based on that
19 hypothetical, that you would not arrest the defendant? That
20 that defendant did not, in your mind, rise to the level of
21 probable cause for a DUI arrest? Is that what you're
22 telling the ladies and gentlemen of the jury?

23 MR. RABEN: I would renew my objection to the
24 facts, the hypothetical is not consistent.

25 THE COURT: Overruled.

1 THE WITNESS: First of all, you asked me three
2 different questions. One answer, I can't --

3 BY MR. GILFARB:

4 Q Let me rephrase. Would you arrest a defendant,
5 would you arrest that subject for a DUI?

6 A No, because he has only failed one of the tests of
7 the three you just gave me. I would not arrest him based on
8 that information.

9 Q Let me add some more information.

10 Suppose you observe bloodshot eyes. Let's say you
11 observe the smell of an alcoholic beverage. Let's say that
12 you observe an alcoholic container inside his vehicle
13 pursuant to the stop. Let's say you observed what appeared
14 to be dishevelled clothing.

15 Now, does your story change? Now do you have
16 probable cause for a DUI stop, all inclusive, all
17 circumstances?

18 A Based on all the information you gave me, it's
19 possible. However, I could not evaluate that without
20 evaluating all the tests.

21 The purpose of --

22 THE COURT: Let him finish.

23 THE WITNESS: The purpose of the roadside tests
24 are to evaluate what you observe on the street.

25 Because an individual has a drink or had something to

1 drink, it's not illegal. It's not illegal to have
2 bloodshot, watery eyes or be unsteady. If you do
3 administer a battery of roadside tests and an
4 individual fails two out of the three tests, the answer
5 is yes, I would arrest him.

6 If he fails one, one of the three, no, I would not
7 arrest him.

8 BY MR. GILFARB:

9 Q Based upon your opinion, if the defendant failed
10 two out of the three tests, you would arrest him?

11 A Yes, I would. Yes, sir.

12 Q If he failed three out of the four, would you
13 arrest him?

14 A Yes.

15 Q Four out of the four, obviously you would arrest
16 him?

17 A Yes, sir.

18 Q That would be based upon your subjective
19 understanding or observations on the scene?

20 A It would encompass my observations and physical
21 performance.

22 Q That would be a totality of the circumstances?

23 A Yes.

24 Q Now, you have indicated to the jury certainly
25 people with bloodshot eyes alone don't get arrested for DUI?

1 A That's true.

2 Q Certainly somebody a little bit dishevelled
3 doesn't get arrested for DUI?

4 A That's correct.

5 Q Certainly someone who missteps once or twice on
6 the walk the line, they don't get arrested for DUI in and of
7 itself?

8 A They shouldn't; no.

9 Q Okay. You wouldn't do that?

10 A I wouldn't do that, no.

11 Q Okay. Let's say they failed one test, the walk
12 the line. They failed the one test. Would you arrest them?

13 A One test out of how many? Three?

14 Q Only one test given.

15 A Well, first of all, I would not give just one
16 test.

17 Q One test was given.

18 A Again, I would have to be there to look at the
19 other circumstances.

20 Q Okay. You testified earlier about failing
21 individual tests and making your determination based upon
22 individual tests.

23 If he failed this one, did he fail that one?

24 A That's correct.

25 Q Isn't it true that the way they are supposed to be

1 evaluated is a totality of the circumstances and not to say
2 he failed this test or that test, but how he performed
3 overall?

4 A Certainly how he performed overall. The question
5 is, did he pass the roadsides. If you have an individual
6 that passes all the roadsides, it's obvious you should not
7 arrest them.

8 Q So, you are calculating the roadsides individually
9 and not in a totality?

10 A No, I never said that.

11 Q Please clarify.

12 A What I stated was that in viewing the subject and
13 observing his demeanor, bloodshot, watery eyes, slurred
14 speech, ability to walk and talk, these are all taken into
15 consideration.

16 If when you give the roadsides, if the individual
17 is impaired or if he is operating a motor vehicle to the
18 extent his normal faculties are impaired according to the
19 studies, he should fail the roadside tests. That's where
20 you make your evaluation.

21 Q On direct examination, you testified concerning
22 individual tests and whether he would pass or fail the
23 individual tests. You did not talk about the totality of
24 the circumstances; did you?

25 A I was not asked that.

1 Q You were not asked that, but I'm asking you now.
2 Isn't it true that you did not base whether you're going to
3 arrest somebody on how they performed the walk the line and
4 how they performed the finger to nose or balance test
5 individually, but you look, "Hey, he did poorly on this one.
6 That's not so good. He missed eight of the -- he missed
7 four out of the eight points. And on the finger to nose, he
8 missed three out of six times."

9 And you don't look at the individual tests, but
10 you look at them as a total, so they can make sense to you
11 in order to make an arrest; isn't that true?

12 A Well, again, I will answer that the way I did the
13 other two times is that you have to look at everything as a
14 whole. But the tests are scored individually. You still
15 must make a determination on each individual tests. That's
16 the purpose for giving them.

17 Q Obviously. But you just said you make a decision
18 based upon the totality of the circumstances; don't you?
19 Yes or no.

20 A Well, obviously yes.

21 Q When you were a police officer, did you take
22 defendants back to be tested on the Intoxilyzer?

23 A Yes.

24 Q That's a very reliable instrument when properly
25 maintained?

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1 A When properly maintained procedures are done
2 perfectly, it is.

3 Q 1681. The instrument in this case was properly
4 maintained. Have you had a chance to look at those
5 documents; didn't you?

6 A The documents were correct; yes, sir.

7 Q Therefore, that instrument was functioning
8 properly on that day; isn't that true?

9 A According to the instrument, it was. I have no
10 reason to believe it wasn't.

11 Q There is nothing wrong with the breath reading
12 that came out on this case; is it? That is a true and
13 accurate reading?

14 A An exact reading; that's correct.

15 Q Sometimes readings can be -- often times readings
16 are not identical. There are two readings which are
17 required by the instrument here in Florida. Most of the
18 time these readings aren't exactly the same; isn't that
19 correct?

20 A That's correct.

21 Q If you can guesstimate in your best learned
22 estimations, what percentage of the time do you have two
23 exact readings as opposed to two different readings?

24 A You mean, right to the third digit?

25 Q That's correct; .113 and .113 as opposed to .113

1 and .117?

2 A I would probably say less than one percent of
3 that.

4 Q Okay. So in your experience, very rarely do the
5 readings come out the same?

6 A That would be correct.

7 Q Okay. Isn't it true that the reading depends on -
8 - strike that.

9 You told this jury on direct examination that it's
10 not the length of the blow which counts. Is that fair and
11 accurate?

12 A That's fair and accurate.

13 Q What is it then that makes one reading higher than
14 another?

15 A Well, generally, as I indicated, it's the strength
16 of the blow.

17 Q Okay. And the strength of the blow, by that
18 you're saying let's --

19 A Or it could be time, but in this case, time is not
20 a factor.

21 Q Okay. Why is time not a factor in this case?

22 A Because there is only, I believe, two minutes
23 between the blows. If there would have been more time, time
24 could have been a factor but there wasn't in this case.

25 Q When you're talking about the pressure of the

1 blow, let's say I'm sitting down at the Intoxilyzer and you
2 say Mr. So and So, take the tube here and blow into the
3 Intoxilyzer. I went (indicating).

4 What would happen? Is that what you mean by
5 pressure?

6 A That would be an invalid test. It's not six
7 seconds. What I mean, is that if an individual empties his
8 lungs, sort of speaks six seconds by blowing hard or as hard
9 as he can, that would probably give him a maximum reading.

10 Q Would that reading be falsely high?

11 A I wouldn't say false; no.

12 Q Isn't it true, in fact, that any well maintained
13 and properly functioning Intoxilyzer, that any mistake that
14 that instrument makes would insure or benefit the defendant?

15 A Most of the time, yes.

16 Q Now, in this case, we have a .107 reading and .121
17 reading. You are aware of that?

18 A That's correct.

19 Q It's not your testimony that the reason why he
20 first blew .107 and then two or three minutes later .121 is
21 that he was on his way up. That's not what you're saying;
22 is it?

23 A I didn't say that; no. It came out to be -- he
24 did peak at that time, otherwise -- I'm not saying the
25 reading itself meant that.

1 Q But what you're saying is not that he didn't peak
2 at .107, but he peaked at .121 or that he just generally
3 peaked around the time the test was given?

4 A He peaked around the test time, the time the test
5 was given.

6 Q Okay. The deeper the lung sample, the more
7 accurately the reading will reflect your true breath alcohol
8 level; isn't that correct?

9 A That's correct.

10 Q So if a defendant blows for six seconds and
11 reaches let's say, .10, okay?

12 A Yes.

13 Q Then he blows for 12 seconds. Which of the
14 readings will provide a true or -- I'm sorry. Which of
15 those two would be a deeper lung sample?

16 A The .12.

17 Q The .12? That's because he blew longer and
18 therefore, expelled more deeply or got rid of all the lung
19 air and got deeper in his lungs?

20 A Yes.

21 Q That's a reading that is called closer to measure
22 his true and accurate blood alcohol level?

23 A I would say that's true.

24 Q Isn't it true that every time you have two
25 disparate readings, one that's lower than --

1 A Two what?

2 Q Different readings. And also isn't it true that
3 the higher one is going to be closer to his true accurate
4 breath alcohol level?

5 A If everything on the instrument is working
6 correctly, I would say so.

7 Q So in this case, it was not the .107 which is
8 closer and truer to his actual breath alcohol level. It's
9 in fact the .121?

10 A The .121 would be a deeper lung sample than the
11 .107.

12 Q Well, let's take it a step further and therefore,
13 closer to his truer breath alcohol level; isn't that?

14 A Truer to his blood alcohol level; correct.

15 Q Okay. You did some charts and some graphs on the
16 board. I want to ask you generally about this.

17 We had discussions before you took the stand
18 outside earlier today; right?

19 A Correct.

20 Q When we talked, [REDACTED] Winmark's
21 (phonetic) formula has ten percent error factor?

22 [REDACTED]

23 Q And just for refreshing the jury, Winmark's
24 formula, am I not correct, the method by which you do the
25 retrograde extrapolation?

1 A That's correct.

2 Q You also told me that the error factor in
3 Winmark's formula depends on certain variables, whether they
4 are provided or not?

5 A Yes, sir.

6 Q In this case, it's your opinion that you have
7 enough answers to all those variables to give an opinion
8 which you are one hundred percent certain about?

9 A I never said one hundred percent certain. What I
10 said, there is still ten percent error factor, but I have
11 the information needed to which I normally don't get to
12 arrive at a figure. Yes, sir.

13 Q You were in Court when Officer Sam Behar
14 testified; isn't that true?

15 A Yes, I was.

16 Q You heard Officer Behar talk about how he would
17 not venture to formulate under Widmark extrapolation. You
18 heard him say that?

19 A Yes.

20 Q You heard him say that because he does not know
21 what the defendant's conversion ratio is. He doesn't know
22 how this body, how quickly this body or how slowly this body
23 converts the alcohol; isn't that true?

24 A I heard him say that; yes.

25 Q And in your opinion, you also heard Officer Behar

1 say that in his opinion, unless you know that you cannot
2 give, you cannot be one hundred percent sure as to what the
3 exact retrograde extrapolation is, exact retrograde
4 extrapolation. Isn't that true?

5 A Well, I don't recall him saying one hundred
6 percent sure.

7 Q Isn't that true?

8 A But yes, that would be true.

9 Q That would be true and yet you haven't conducted
10 any of those types of tests on defendants?

11 A No. I said I use the standard 2100 to 1 used
12 throughout the world.

13 Q But one hundred percent doesn't mean it's 2100?

14 A It doesn't mean it is, no.

15 Q Okay. Now, you did not conduct, you did not draw
16 blood on this gentleman; did you?

17 A No, I did not. But --

18 Q For purposes of conducting a study?

19 A Correct. But the reason that I did, or the reason
20 the conversion factor doesn't matter is because the
21 Intoxilyzer is based on 2100 to 1.

22 Q So I'm not asking about the Intoxilyzer. Let me
23 ask the questions, then you can --

24 MR. RABEN: He is cutting him off.

25 THE COURT: Your objection is sustained. Yours is

1 overruled, and you need to just answer the question
2 asked of you. You can't add.

3 THE WITNESS: I'm trying to answer the question.

4 THE COURT: You do answer the question; okay?

5 THE WITNESS: I will. I'm sorry.

6 BY MR. GILFARB:

7 Q You didn't conduct -- temporaneous conduct -- He
8 would blow into the instrument. You drew blood to see what
9 his conversion ratio is; isn't that true?

10 A Yes.

11 Q Isn't it true, when you get one to one reading and
12 that is the one that we're going to talk about.

13 You testified that that would be closer to his
14 true blood, I'm sorry, breath alcohol level if you got one
15 to one reading. Isn't it true that this is, first of all,
16 this is a breath reading. This was not a blood reading; is
17 that correct?

18 A It's a breath reading based on blood; yes.

19 Q If you drew blood, it would be a higher -- it
20 would be higher because blood is more accurate? Obviously,
21 because alcohol is absorbed directly into the blood?

22 A That's correct.

23 Q If you drew blood, you would get usually a higher
24 reading than a breath; isn't that true?

25 A Generally, yes, sir.

1 Q Now, doesn't the number .121, that has nothing to
2 do with your blood; does it?

3 A Of course it does.

4 Q In what way?

5 A Because the Intoxilyzer is based on a national
6 ratio, 2100 to 1. The instrument must work off of
7 something. 2100 cc's or milliliters of breath versus 1 cc
8 of blood. That's what it's based on.

9 Q But that doesn't mean that you can. Can you
10 extrapolate what his blood level would have been just from
11 that number?

12 A I couldn't. Could it be done? Yes.

13 Q Through a computer?

14 A Well, probably a toxicologist could do it.

15 Q Now, let's get back to the Widmark. We talk about
16 variables. One that Officer Behar talked about, that's the
17 contemporaneous studies that you have to do on the
18 individual. That's one.

19 Let's talk about another one. Let's say that now
20 you have based your opinion in this Court, based upon the
21 representations that the defendant has made to you. Isn't
22 that true?

23 A Well, I based it on three things; yes, sir.

24 Q And the defendant has told you that he had a
25 certain amount of beer in a certain amount of time; isn't

1 that true?

2 A That's correct.

3 Q Now, let's say the variables, the numbers change
4 by half an hour. Let's take it step by step. Let's say
5 they changed before half an hour earlier. Everything
6 happened a half an hour earlier. How would that change your
7 opinion?

8 A Can I look at my sheet for a second?

9 Q Certainly.

10 A You mean everything, the time he gave me, all
11 moved up 30 minutes earlier or just one time?

12 Q Because there are so many different time factors,
13 let's take when he first started drinking. Let's say
14 everything is moved back a half an hour.

15 A Move everything?

16 Q Except the time. We know for certain the breath
17 reading, which is 4:07.

18 A Okay. One second.

19 Q Move everything back half an hour. How does that
20 change the whole Widmark formula?

21 MR. RABEN: So I am clear, are we moving the time
22 of arrest back half an hour from 2:40 to 2:10?

23 MR. GILFARB: Just the drinking.

24 BY MR. GILFARB:

25 Q Just the drinking.

1 A I have it, sir.

2 Q Okay. What is the result?

3 A The result would be from 30 to 40, the peak time.

4 So I would have him peaking around 10 minutes to 4:00, which
5 means that at 4:07, which is still the time of the breath
6 test, I assume.

7 Q Right.

8 A He was using the same time that he gave would be
9 10:00 to 11:00 would be his high. Now, that won't change it
10 that much. Change it by another half an hour, it would
11 change it more.

12 Q Oh now, obviously he went down?

13 A Obviously.

14 Q Your number went down obviously?

15 A Yes, sir.

16 Q If you change the half an hour time factor up,
17 that would change his reading up, wouldn't it?

18 A Yes.

19 Q Okay. Let's say that half an hour is mixed
20 somewhere in between. Let's say he has the starting time
21 and since that time he is accurate. There is a half an hour
22 difference in between as to when he had the two beers.
23 Would that make a difference?

24 A Well, are we still using 4:07 test time?

25 Q Yes.

1 A Okay. Now, I'm afraid I'm a little bit lost here.

2 Q What time did you say that he started?

3 A He started between 10:30 and 11:00. He had his
4 first drink.

5 Q You're estimating between 10:30 and 11:00. We
6 don't know if it's 10:30 or 11:00?

7 A I'm estimating that the drinking was completed by
8 11:00.

9 Q He says he stopped when?

10 A At 2:30.

11 Q Now, let's say -- and he told you about some other
12 drinks in between?

13 A Yes, sir.

14 Q What were those times?

15 A Between 12:30 and 2:00. He had two beers.

16 Q Let's say the two beers he had actually half an
17 hour later than the time he gave you. What would that mean?

18 A Well, by moving both times, it would give us a
19 reading between 1:00 and 2:30, so that would move up our
20 times half an hour, if that's your question.

21 Q His readings would be higher?

22 A Okay.

23 Q Isn't that true?

24 A Yes, sir.

25 Q Now, we have dealt with the time factors. You