

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

STATE OF FLORIDA,)
)
Plaintiff,)
)
vs.)
)
ALEJANDRO PONCE,)
)
Defendant.)

CASE NO. 98-10280MM10A
JUDGE LEE

**CERTIFIED
COPY**

Proceedings had and taken before the
Honorable Robert W. Lee, one of the judges of
said court, at 201 Southeast Sixth Street, Room
500, Broward County Courthouse, commencing on
October 28, 1998, in the City of Fort
Lauderdale, County of Broward, State of Florida,
and being a JURY TRIAL

APPEARANCES:

MICHAEL J. SATZ, STATE ATTORNEY
By: JENNIFER FAERBER, ATTORNEY AT LAW
ASSISTANT STATE ATTORNEY
and
By: MELISSA STEINBERG, ATTORNEY AT LAW
ASSISTANT STATE ATTORNEY
Appearing on behalf of the Plaintiff.

JONATHAN JONASZ, ESQUIRE
Appearing on behalf of the Defendant.

* * *

(EXCERPT OF JURY TRIAL)

I N D E X

1		
2	PROCEEDINGS	PAGE
3	JURY TRIAL	
4	WITNESS	
5	Rick Swope	
6	DIRECT EXAMINATION	3
7	CROSS EXAMINATION	45
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2 THE COURT: Have a seat, sir, and position
3 the microphone in front of you. Mr. Jonasz, you
4 may inquire.

5 MR. JONASZ: Thank you very much, Judge.

6 DIRECT EXAMINATION

7 BY MR. JONASZ:

8 Q. Sir, would you please just state your full
9 name for the jury.

10 A. My name is Rick Swope, S-w-o-p-e.

11 Q. Mr. Swope, have I ever asked you to testify
12 on a breath case on behalf of me or any of my
13 clients?

14 A. No, sir, this is the first time.

15 Q. Would you tell the jury about your
16 education, sir.

17 A. I obviously graduated from high school. I
18 have a Bachelor's degree in Criminal Justice from St.
19 Thomas University. I have a Master of Science degree
20 in Technology and Engineering from the University of
21 Miami. I was a police officer for 15 years. During
22 that time I held breath certification for both
23 maintenance and an operator. I held that for, I
24 guess, somewhere around 10 or 11 years.

25 I have been doing breath testing in the

1 breath testing field since 1974. As I said, I was a
2 police officer. I also hold certifications to teach
3 for the federal government, the National Highway
4 Traffic Safety Administration. I also hold
5 certificates to teach in the State of Florida, and
6 it's also a comparative thing, meaning that when you
7 hold certain certifications you can teach in other
8 states as well. And I hold that certificate also.
9 And for education that's probably it.

10 I do ongoing education every year. I write
11 articles, do research and things like that.

12 Q. What type of courses have you taught
13 specifically?

14 A. Well, I have taught courses dealing with
15 accident reconstruction, basically engineering
16 activities involving accidents. That's the primary
17 thing that I do. I also teach and have wrote
18 articles and outlines in the area of breath testing,
19 dealing with -- well, basically several different
20 machines, but the 5000 has been used for several
21 years now. I have written articles and
22 experimentation involving the Intoxilyzer series.

23 There actually are three machine series. I
24 have done outlines for police academies and training
25 programs. I have taught at I don't know how many

1 different areas in the state of Florida and around
2 the country. I have lectured at Harvard Law School,
3 Emory University, virtually every major city in the
4 country for the most part.

5 Q. Have you testified as an expert previously?

6 A. Yes.

7 MR. JONASZ: Judge, at this time I would
8 like to tender Mr. Swope as an expert witness.

9 MS. FAERBER: Objection, judge, improper.

10 THE COURT: Keep going then.

11 MR. JONASZ: No problem.

12 BY MR. JONASZ:

13 Q. Mr. Swope, why don't you tell us more about
14 yourself.

15 THE COURT: Let me just back up to make it
16 a little bit easier, instead of just -- you want
17 to tender him as an expert in what field, sir.

18 MR. JONASZ: Tender him an expert in breath
19 testing.

20 THE COURT: Why don't you just focus in on
21 that.

22 BY MR. JONASZ:

23 Q. Very well. Tell the jury about any
24 articles you have written on breath testing. Tell
25 the jury any research you have done in the area of

1 breath testing. Tell the jury about any type of
2 experience you have with breath testing.

3 A. Well, I actually got in the breath testing
4 field in 1974. I probably either administered or
5 have done some type of test well over 10,000 breath
6 tests. There were numerous types of experimentations
7 I have done with the machine, both as a police
8 officer and also in private practice.

9 I am either a coowner or work with
10 individuals who own Intoxilyzer machines. I try to
11 focus on that since it's an Intoxilyzer case. I have
12 gone to the factory where the machines are built and
13 gone through maintenance courses dealing with the
14 machines. I am also with a -- have been with an
15 outfit -- I call it outfit, but it's a company out of
16 Minnesota that deals specifically with testing the
17 5000 series of the machine.

18 In other words we test the diagnostics,
19 take the machine apart and put it back together and
20 check it under all types of different field
21 conditions, et cetera. I have also been involved in
22 blood and breath correlations where individuals are
23 given measured amounts of alcohol, they drink that,
24 ingest it, then we gave breath tests and blood tests
25 and we kind of match that to see how close they are.

1 I am currently working on a project with
 2 Florida International University where I maintain
 3 their machine. They have a machine that they have
 4 purchased for -- under a federal grant that they are
 5 doing studies on breath testing and the effects on
 6 individuals who consume alcohol and how the results
 7 may or may not show -- or may or may not differ on a
 8 particular machine.

9 My job is to make sure the machine is
 10 scientifically reliable, meaning that what you see on
 11 the card is what you get basically. And as I
 12 indicated before I have written various articles on
 13 some of the things that work good with the machine
 14 and some of the things that work bad with the
 15 machine. I have taught at police academies. I
 16 taught for ten years. Part of the program was
 17 dealing with individuals that were impaired in breath
 18 testing.

19 I have taught somewhere in the neighborhood
 20 of 6,000 police officers around the country and the
 21 State of Florida. I have taught for the University
 22 of North Florida, the University of Louisville and
 23 Kentucky several years as an adjunct instructor.
 24 That's some of what I have done.

25 MR. JONASZ: Judge, at this is point I'd

1 like to tender him as an expert in breath
2 testing.

3 MS. FAERBER: Judge, the state still
4 objects.

5 THE COURT: Mr. Swope, since I am the one
6 that ultimately determines if you are or are not
7 going to testify as an expert.

8 THE WITNESS: Right.

9 THE COURT: You stated that it was your
10 responsibility to determine if these machines
11 were scientifically reliable?

12 THE WITNESS: Yes, sir.

13 THE COURT: Can you explain to the jury or
14 to me what makes you feel that you are qualified
15 to give -- make those determinations. What type
16 of training have you had in the science of
17 breath testing, the Intoxilyzer, that's my main
18 concern?

19 THE WITNESS: Well, my terminology may be
20 just a little different, Judge, than yours for
21 the science. What I am saying is that as an
22 engineer doing engineering activities I have to
23 make sure the machine meets requirements of
24 doing scientific experiments or tests, meaning
25 that the diagnostics, the infrared, the

1 printers, the breath tubes, and on and on are
2 all working properly. Also that the machine is
3 maintained to the third digit, meaning that the
4 solutions that we're using for interference for
5 acetone, for alcohol, that they meet the
6 standards of writing a scientific article,
7 meaning that the machine has to pass a series --
8 it's not similar to what you see on the state's
9 form, but it's somewhat similar.

10 THE COURT: Well, let's do this: I am
11 going to accept him as an expert in the field of
12 the Intoxilyzer 5000; however, if you get into
13 any questions involving a physiological response
14 you're going to need to --

15 MR. JONASZ: I would like to also inquire
16 as to Mr. Swope's police background in roadside
17 sobriety exercises and tender him as such.

18 THE COURT: That one I don't have a problem
19 with either. Make sure you don't get into
20 questions that deal with fevers and all that
21 type of thing. I don't think we're there yet.

22 MR. JONASZ: Certainly I wouldn't expect
23 that, Judge.

24 THE COURT: Okay.

25 MR. JONASZ: We'll ask him the questions

1 and if he can answer he can answer.

2 THE COURT: As far as the operation, the
3 maintenance and so forth.

4 BY MR. JONASZ:

5 Q. Tell the jury, if you would, your
6 background, your experience in what's commonly
7 referred to as roadside sobriety exercises.

8 THE WITNESS: Well, the roadside sobriety
9 exercises I was given the -- took the National
10 Highway Traffic Safety course which initially at
11 that time was a 40-hour course when it first
12 started in the 1980s. At that time you were
13 then required to take an additional 40-hour
14 course, so that was 80 hours, in knowing how to
15 administer and interpret roadside exercises.

16 After that I was then, I believe, in 1985 I
17 was selected to be an instructor for the State
18 of Florida. They selected, I believe, 20 or 30
19 people from around the state. I was one of the
20 ones that was selected and went to an 80-hour
21 training course to be an instructor, then went
22 to an additional 40-hour course to become a
23 NHTSA instructor, which is a branch of the
24 federal government.

25 Upon doing that I then passed those

1 qualifications. Then I taught somewhere in the
2 neighborhood of probably 6,000 individuals, all
3 police officers, over a period of ten years, and
4 I was certified to teach from the federal
5 government, meaning I do sign a permit for
6 officers in all 50 states and have taught
7 officers from all 50 states. I also was
8 involved in some studies involving field
9 sobriety exercises for a period of approximately
10 four years, studies where police recruits were
11 used and other individuals that were given
12 alcohol in an alcohol environment and we would
13 then rate how they do on these particular
14 exercises, see if their response was roughly the
15 same as those individuals that were in the
16 governmental responses. So that's pretty much
17 how I got into it.

18 And then I wrote -- published three
19 articles dealing with field sobriety exercises.

20 MR. JONASZ: At this time, Judge, I would
21 tender Mr. Swope as an expert in roadside
22 sobriety exercises, or I could continue to ask
23 him more questions.

24 MS. FAERBER: Judge, the state would object
25 to the need for an expert in field sobriety

1 exercises, and the state would cite Meador.

2 THE COURT: Well, I think Meador says just
3 the opposite, but I think under Meador almost
4 any police officer can be an expert in field
5 sobriety exercises because they all have the
6 same training.

7 If I'm not mistaken, I may have missed it,
8 Mr. Swope, did you say you did have the police
9 academy training?

10 THE WITNESS: Yes, I did.

11 THE COURT: To start with?

12 THE WITNESS: Right.

13 THE COURT: How long were you a police
14 officer?

15 THE WITNESS: 15 years.

16 THE COURT: Okay. So with that I will
17 accept him as an expert in the roadside sobriety
18 exercises.

19 MS. FAERBER: Judge, just for the record we
20 would state it's not the proper testimony
21 subject for an expert to testify about.

22 THE COURT: Got you.

23 MS. FAERBER: Thank you.

24 BY MR. JONASZ:

25 Q. Mr. Swope, is your compensation dependent

1 on how you testify today?

2 A. No.

3 Q. And if the state wanted to hire you to
4 testify for them, would you?

5 A. Sure. Depending on the facts. I always
6 look at the case first and see if there's something I
7 can help on. Most of -- probably 60 percent of the
8 cases I really can't be of assistance, so the other
9 40 percent I normally take.

10 Q. Do you charge the same rates for both the
11 state and the defense?

12 A. Generally I do, yes. Sometimes depending
13 on the county I am in if it's a state rate I have to
14 go by governmental standards, you know, there are
15 standards counties will pay and I have to go by
16 whatever that is.

17 Q. Your Honor, may I approach the witness?

18 THE COURT: You may. I have already shown
19 the prosecutors what's been previously marked as
20 Defendant's Exhibit B for Identification.

21 Mr. Swope, do you recognize what I'm handing
22 you?

23 MS. FAERBER: Your Honor, I object.

24 THE COURT: He's just looking at it.

25 MS. FAERBER: I understand, Judge.

1 THE WITNESS: Yes, sir, I do.

2 BY MR. JONASZ:

3 Q. What is that, sir?

4 A. It's a curriculum vitae that I have.

5 Q. Is that an accurate and complete curriculum
6 vitae of yourself?

7 A. It's accurate. There's probably additional
8 classes I put on there in the last year, but it's
9 fairly accurate, yes, as far as up-to-date, I should
10 say.

11 Q. Does that represent on paper pretty much
12 what you have explained to this jury, your
13 qualifications?

14 A. Yes, sir, it is.

15 MR. JONASZ: Judge, I'd like to move this
16 into evidence as Defendant's Exhibit 2.

17 THE COURT: I think the state is going to
18 object.

19 MR. JONASZ: I think so too, Judge.

20 THE COURT: Let me take a look at this.
21 You can proceed. Let me look at it and I will
22 reserve on this, but you can proceed.

23 MR. JONASZ: That's fine.

24 Q. Mr. Swope, have you reviewed this
25 particular case, Mr. Ponce's case?

1 A. Yes.

2 Q. Are you now aware that there were some
3 roadside sobriety exercises in this case?

4 A. Yes.

5 Q. And let me ask you some hypothetical
6 questions, if I can.

7 A. Sure.

8 Q. If an individual is asked to do a roadside
9 sobriety exercise and that individual has to urinate,
10 how will that effect their performance?

11 A. Well, any additional -- well, what's really
12 a stress indicator could cause a person to possibly
13 not do as well as they normally would. We call that
14 an environmental condition, whether it be in the
15 person or some other factor that comes into play.

16 Q. Now, somebody who has to urinate badly,
17 would that effect your concentration?

18 A. It could, sure.

19 Q. Now, if somebody had taken medication, some
20 sort of cough syrup, perhaps, how would that possibly
21 effect their performance on a roadside sobriety
22 exercise?

23 A. Well, it just depends. The ones that I
24 have been involved with or observed where they took
25 that kind of substance, it depends on if they are

1 tired. Obviously it depends on how much they take.
2 Normally people don't take great amounts of
3 medication, but obviously the more you take the more
4 it can effect you.

5 Q. Now, are instructions important in a
6 roadside sobriety exercise? Instructions meaning the
7 person who gives the instructions, such as a police
8 officer?

9 A. They are very important, yes.

10 Q. Why are they important?

11 A. Well, they are important because the
12 officer is looking for a specific area in what's
13 called divided attention tasks or exercises, and in
14 other words to be able to evaluate what the subject
15 is doing the officer has to ascertain and make sure
16 that he is given the proper instructions so that the
17 person can follow it and perform it to the best of
18 their ability.

19 Q. Assume for a second instructions may be
20 less than clear, how would that then effect an
21 individual's performance on the roadside sobriety
22 exercise?

23 A. Well, it could effect -- obviously it
24 depends on how the officer sees it, but it could
25 effect it quite a bit, depending on what the person

1 thought that they understood or not.

2 Q. Now, the officer who's watching the
3 roadside sobriety exercise and judging the person's
4 ability to do them, what type of judgments are they
5 making?

6 A. Well, they are obviously making a judgment
7 as to how they performed.

8 Q. Is it objective or subjective judgment?

9 A. Probably objective.

10 Q. How does an individual's coordination
11 impact on their ability to do roadside sobriety
12 exercises?

13 A. Well, coordination depends a lot, but that
14 basically gets into the area when you deal with
15 coordination of what's called a fail to design task.
16 Meaning that the task that they are asked to do is
17 designed to fail, in other words.

18 Q. Now, if someone was asked to do the one
19 legged stand exercise, are you familiar with that
20 exercise?

21 A. Sure.

22 Q. And an individual experienced some back
23 discomfort, how would that effect their performance
24 on the exercise?

25 A. Well, it could effect their balance and it

1 could effect their ability to keep their foot up for
2 the required period of time, which is 30 seconds.

3 Q. Now, are you aware of any literature which
4 stands for the proposition if someone doesn't sway,
5 somebody who's doing roadside sobriety exercises
6 perfectly still --

7 A. No.

8 Q. In your experience does an individual who's
9 doing roadside sobriety exercises, even if they're
10 completely impaired by alcohol, is there a sway?

11 A. There normally is, yes.

12 Q. Let's talk about the observations for a
13 second. The appearance of eyes that are red, watery
14 eyes; is that an indicator only of impairment?

15 A. No.

16 Q. What else would that indicate?

17 A. Well, it could indicate a number of things.
18 You know, some people just have bloodshot eyes. It
19 could indicate they're tired, smoky, all kinds of
20 things. Generally tired.

21 Q. Now, if somebody has sort of a reddish
22 complexion; is that simply an indicator of impairment
23 due to alcohol?

24 A. No.

25 Q. What else could that possibly show?

1 A. Well, again, some people have flushed
2 faces, or they are red in the face, or could be that
3 they are tired, or could be that they are, you know,
4 smoke, as well as it could be stress. It could be a
5 number of things obviously.

6 Q. How important is a person's equilibrium
7 when they are doing a roadside sobriety exercise?

8 A. Well, it's real important, obviously, to
9 the person who's watching the exercise. You know,
10 some people have a little bit of a sway or gait
11 anyway, but that's very important because they are
12 asked to stand pretty much in an erect position.

13 Q. Are you familiar with the symptoms of the
14 common cold?

15 A. Pretty familiar, yeah.

16 Q. Now, assume for me for a moment that
17 somebody has the symptoms of a common cold and that
18 there's fluid perhaps in the back of their ears or in
19 their eustachian tubes and they're somewhat
20 congested; would fluid in the eustachian tubes, would
21 that effect equilibrium?

22 MS. FAERBER: Judge, I'm going to object.
23 This witness hasn't been qualified as an expert
24 in physiology.

25 THE COURT: Sustained.

1 MR. JONASZ: Would it effect the
2 equilibrium?

3 THE COURT: Why don't you characterize it
4 in terms of the field sobriety exercises.

5 BY MR. JONASZ:

6 Q. In the context -- I apologize. In the
7 context of field sobriety exercises. I'm not asking
8 for some sort of medical diagnosis what somebody
9 should do for that problem, but in the context of
10 field sobriety exercises if somebody has fluid in
11 their eustachian tubes, can that effect their
12 equilibrium?

13 A. It can, sure.

14 Q. If it effected their equilibrium what type
15 of manifestation may it produce?

16 A. Well --

17 MS. FAERBER: I'm going to object because
18 on the same grounds, this person has been
19 qualified as an expert in field sobriety
20 exercises, not an expert as to how equilibrium
21 would effect someone.

22 THE COURT: I note your objection but I am
23 going to allow it. Mr. Swope, you can answer
24 the question.

25 THE WITNESS: It could show some signs of

1 swaying or some balance problem.

2 BY MR. JONASZ:

3 Q. Now, let's talk about breath testing for a
4 moment. Are you familiar with what's commonly
5 referred to as the Intoxilyzer 5000?

6 A. Yes, I am.

7 Q. May I approach, Judge?

8 THE COURT: You may approach.

9 MR. JONASZ: And I have already shown this
10 schematic to the state. They have taken a look
11 at that.

12 THE COURT: If you are going to refer to
13 that, step down and get closer to the jury,
14 because I know you probably can't read the words
15 from that distance.

16 MR. JONASZ: I can bring it closer with the
17 Court's permission. Can Mr. Swope come up to
18 the jury and that way no one has to crane their
19 neck?

20 THE COURT: Sure. You don't have a pointer
21 with you, do you?

22 THE WITNESS: I don't think so.

23 BY MR. JONASZ:

24 Q. If you would, briefly explain to the jury
25 using the schematic, how breath test functions occur

1 in this particular machine.

2 A. Okay. Really very simply how the machine
3 works is that when the machine is warmed up it takes
4 about 20 minutes to warm up the machine. The machine
5 goes through a series of some internal checks. It
6 goes through that and then what happens is that you
7 will see where it says the breath exit and pump exit,
8 and actually what it does at that particular time is
9 it actually -- this is really reversed. And what
10 happens is that the machine sucks in room air and
11 what it does is it's actually cleaning out the
12 chamber.

13 This is a sample chamber. And it sucks in
14 room air. And anything that is in the chamber is
15 actually being taken through the pump and pumped out
16 here. So it does say exit, but it also actually
17 intakes breath or air from the room. There is a
18 breath hose on the side of the machine, and in this
19 particular case it doesn't have one. Actually this
20 is really reversed.

21 This is a breath inlet for the sample
22 chamber, but actually if you look at the machine head
23 on there would be a breath hose on the left side of
24 the machine and the breath would go in through a
25 heater tube, would end up going into a sample

1 chamber, where it's actually captured, and there is
2 whatever breath the individual has blown.

3 He must blow for a certain amount of time.
4 You see on here it says light path and filter wheel
5 and infrared energy detector and the source of -- in
6 other words, the source of light. So the best way I
7 can explain it to you would be if you had a balloon
8 and you blew the balloon up and you had a flashlight
9 and you shine the light through the balloon, there's
10 a certain amount of light that would go through the
11 balloon, through the air, and show on the other side,
12 and then measure that light.

13 Now you take the same balloon and now you
14 blow smoky air into it, like take a puff of
15 cigarette, and the amount of light coming into it
16 would be reduced, kind of like driving at night
17 through the fog. Same thing. Your headlights only
18 show so far in the fog.

19 You can then get a difference
20 mathematically between the clean air and the smoky
21 air that will give you a numerical value. That's
22 exactly the way the Intoxilyzer works. In lay terms
23 it just takes the fact the room air we're breathing
24 now is .000 ethanol or alcohol, or any substance that
25 matches that in the chamber the filter wheel will

1 pick that up and give you the difference between the
2 two and give you a numerical reading and then the
3 machine goes through the whole cycle again, and
4 that's what it does.

5 Q. Now, you are familiar with the maintenance
6 that F.D.L.E. requires on the Intoxilyzer?

7 A. Yes.

8 Q. Have you had any experience with that
9 maintenance?

10 A. Sure.

11 Q. Have you ever conducted it?

12 A. Yes.

13 Q. How often?

14 A. Well, each machine has to be done once per
15 calendar month and once in January. It has to be
16 done once in February. Not every thirty days, once
17 per calendar month. Sometimes you do it more,
18 depending on the amount of people you do on a breath
19 machine, but normally you have to do it once per
20 calendar month, but you can do it more. It just
21 depends.

22 Q. Now, is part of the requirement to actually
23 open up the machine and look inside it to some of the
24 devices and components that are outlined here?

25 A. No, it's not required to do that, no. You

1 might have to do it maybe to clean out the printer or
2 maybe you get the card jammed in there during the
3 month or something and you have to clean it out, but
4 it's not required that you actually open the machine
5 up unless something unusual happens.

6 Q. Now, central processing, what exactly is
7 that?

8 A. That's really, I guess, in a nutshell would
9 be your computer where everything is processed and
10 printed out. That's kind of like where the software
11 is in there.

12 Q. How often is that checked to see if the
13 software is functioning?

14 A. Never really unless the machine breaks down
15 or the operator notices something. In other words
16 you might get a card sometimes that prints out really
17 weird with weird things, or you might get a card that
18 prints out the wrong serial number or something like
19 that, then the operator would know that there is a
20 problem usually.

21 Q. And if the printer card didn't have that
22 problem is there any other ways to tell if the
23 software is working or not working?

24 A. No, not really, not if you are a normal
25 operator, no.