

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)

1           A.    Well, really the knowledge I have is  
2 working with the staff. I have not conducted one on  
3 temperatures myself, but staff I have worked with  
4 have, and they have written articles that --  
5 approximately for each degree. In other words, 98.6  
6 Fahrenheit, and every degree above that that a  
7 person's temperature would be effecting the reading  
8 approximately six percent per degree. That's the  
9 basis for that.

10           Q.    Can you calculate based upon your knowledge  
11 of the --

12           THE COURT:   Sir, you said six percent?

13           THE WITNESS:   Six percent.

14           THE COURT:   Six percent per degree.

15           THE WITNESS:   Per degree. Right.

16 BY MR. JONASZ:

17           Q.    Can you have the ability to do calculations  
18 based upon increased temperature to convert a breath  
19 test result?

20           A.    All you would do is figure out the  
21 percentage. Obviously if you have whatever the  
22 reading is and if you figure six percent off of that  
23 or unless their temperature goes under then you go  
24 the opposite way, but higher would inflate the  
25 reading. So if you are up three degrees, let's say

1 101.6, that would be 18 percent that the reading  
2 would be effected.

3 Q. Now, the breath test results in this case  
4 are .137 and .134?

5 A. Right. I think so.

6 Q. Can we conduct an experiment?

7 A. What?

8 Q. Can we conduct an experiment?

9 A. If you want.

10 Q. Let me give you some hypotheticals based  
11 upon those readings. Well, let me ask you this  
12 question before I continue. Do you know of any  
13 protocol used here in Broward County to check the  
14 temperature of a person when they are about to give a  
15 breath test sample?

16 A. No.

17 Q. Based upon the numbers I have just given  
18 you, the breath test results that were established in  
19 this case of this machine, if Mr. Ponce's temperature  
20 was up three degrees, how would that effect the  
21 results?

22 MS. FAERBER: Judge, I'm going to object.  
23 That calls for speculation, facts not in  
24 evidence.

25 THE COURT: Well, he just gave a formula.

1 MS. FAERBER: It goes to the defendant's  
2 body temperature what it was and --

3 THE COURT: Remember, if he's an expert  
4 he's allowed to deal with hypotheticals. Again,  
5 I remind you, ladies and gentleman of the jury,  
6 that's what these are, they're hypotheticals.  
7 They're not based on anything that we know for a  
8 fact. With that in mind you may answer the  
9 question.

10 MR. JONASZ: Other than the fact that he's  
11 testified there's been research and he's  
12 familiar --

13 THE COURT: I mean, we're talking about  
14 hypothetical fevers. I was not talking about  
15 hypothetical formulas. The fever is what I am  
16 saying is hypothetical.

17 MR. JONASZ: I don't want the jury to  
18 misunderstand we're talking about a hypothetical  
19 formula.

20 THE COURT: No.

21 BY MR. JONASZ:

22 Q. Mr. Swope, do you need me to repeat the  
23 question?

24 A. No, I think I know what you said basically.

25 Q. I'm just curious.

1           A.     It would be 18 of -- in other words it  
2 would effect the reading if you take one --  
3 approximately a .137, and it would take 18 percent  
4 off of that of the reading as far as the temperature  
5 goes. So that would give you 18 percent off the  
6 .137. So you come up with a little bit over a .10.

7           THE COURT:   That's a .10988.

8           THE WITNESS:   I've got .109, so you're  
9 better than I am, Judge. I got .109. So that's  
10 pretty close. That gave us a rough estimate. I  
11 mean, you can go with different figures but, I  
12 mean, that would normally give you that. And  
13 there are other factors you could take into  
14 consideration.

15          Q.     Such as?

16          A.     Well, the other factors is that you are  
17 always making the assumption that the .137 that is  
18 used is a correct reading. The machine has a .005  
19 margin of error itself, and it also has what I  
20 consider to be a .020 -- or .020 as far as the  
21 reading could be high or low just based on how the  
22 breath is delivered into the machine.

23                   So even though you have this figure of 18  
24 percent there are other things as well that come into  
25 play, and you have to remember that we're using a

1 number that the machine printed out. So that's  
2 off -- you could be off also with your figures. That  
3 way it will save you time from going through a bunch  
4 of different numbers.

5 Q. Understood. Now, the .137 and the .134 and  
6 the results purportedly obtained as accurate in this  
7 case; is that 100 percent certain that that was the  
8 breath alcohol content of Mr. Ponce when he was  
9 behind the wheel of the car?

10 A. No.

11 Q. Well, why do you say that?

12 A. Well, because there's always a period of  
13 time from the time that a person is driving until the  
14 time that they get to wherever the test facility is,  
15 and their breath alcohol level can change during that  
16 period of time.

17 Q. Now, what is the legal limit in the State  
18 of Florida concerning breath test results?

19 A. .080.

20 Q. And based upon the .134 and the .137  
21 results in this case is it possible to tell whether  
22 Mr. Ponce was a .08 or below when he was behind the  
23 wheel of a car?

24 A. No.

25 MR. JONASZ: I have no further questions.

1 THE WITNESS: Thank you.

2 MR. JONASZ: Thank you.

3 THE COURT: Ms. Faerber or Ms. Steinberg,  
4 which one is it?

5 MS. FAERBER: Ms. Faerber.

6 MR. JONASZ: Your Honor, we moved in the  
7 curriculum vitae in evidence.

8 THE COURT: Thank you for reminding me. I  
9 reviewed the C.V., which is marked as Defense  
10 Exhibit B for Identification, and upon the  
11 Court's finding that about 80 percent of this  
12 has nothing to do with DUI's I am going to  
13 disallow it on the ground of relevance.

14 MR. JONASZ: Can we include the areas on  
15 the curriculum vitae that do have to do with  
16 breath testing?

17 THE COURT: If you want to you can read it.

18 MR. JONASZ: We can whiteout the rest.

19 THE COURT: No. If you want -- he has  
20 already testified as to the courses he took, the  
21 training he had. The only thing, I think,  
22 that's additional in here is the title of his  
23 publications. So if you want you can have him  
24 read that to the jury or we can take that one  
25 page, which would be page No. 8 out of the C.V.

1 and admit that into evidence. Which would you  
2 prefer?

3 MR. JONASZ: Let me have a second, Judge,  
4 if you would.

5 THE COURT: Uh-huh.

6 MR. JONASZ: We can do that page 8 would be  
7 fine. I think that's fair.

8 THE COURT: All right. So the record is  
9 clear we'll remark that. Exhibit B then will be  
10 the entire C.V.. Exhibit C will be just page 8  
11 of the C.V., and Exhibit C will be admitted.  
12 Here's B so the clerk doesn't get confused.  
13 This will be C, Exhibit 2. Exhibit 2, Defense  
14 Exhibit 2.

15 MR. JONASZ: That's correct. Thank you,  
16 Judge.

17 THE COURT: Just that page.

18 MR. JONASZ: Judge, I have copies for the  
19 jury. I will take them out after the young lady  
20 is finished and we'll publish them at that time.

21 THE COURT: Ms. Faerber.

22 OCROSS EXAMINATION

23 BY MS. FAERBER:

24 Q. Good afternoon, Mr. Swope. This is the  
25 first time if have met you. Nice to meet you.



1 A. Good afternoon.

2 Q. The name of your business, is that Swope  
3 and Associates?

4 A. Swope Reconstruction.

5 Q. When did you first go into business?

6 A. I first started the business in 1987 and I  
7 went full time in the business in July of 1990.

8 Q. Okay. And the primary business of Swope  
9 and Associates?

10 A. Swope Reconstruction.

11 THE COURT: Reconstruction.

12 BY MS. FAERBER:

13 Q. Reconstruction. I'm sorry.

14 A. Accident reconstruction. Right. That's  
15 about 90 percent of my activity.

16 Q. Okay. And you testify often in civil  
17 cases, I assume, for accident reconstruction?

18 A. Yes, ma'am, I do.

19 Q. Are you the sole proprietor of this  
20 business?

21 A. Yes, I am.

22 Q. Okay. How much money do you make from  
23 accident reconstruction?

24 A. How much do I make, or my business?

25 Q. Business.

1 A. Probably around \$600,000, somewhere in that  
2 area.

3 Q. Good business. How about --

4 A. Well, it's a good business but I work hard  
5 for it. Nobody gives it to me.

6 Q. I am sure you do, sir. I wouldn't take  
7 that away. About how much do you make for consulting  
8 on criminal defense cases?

9 A. Probably -- and I am just guessing,  
10 probably in the area of maybe 50 to 75,000 per year,  
11 somewhere in that ballpark.

12 Q. Okay. How much do you charge a defendant  
13 to testify on his behalf in criminal court?

14 A. I normally charge depending on the case.  
15 Obviously a felony case I charge more, and I charge  
16 different rates. A misdemeanor I charge a minimum of  
17 a \$500 retainer to review the case, and I charge at  
18 125, \$125 per hour.

19 Now, even if I don't take the case I still  
20 charge the \$500. I still charge that.

21 Q. How do you prepare when you come in to  
22 testify for a criminal defendant? How do you prepare  
23 your testimony?

24 A. Well, obviously each case is different.  
25 Normally the issues are the same when I decide to

1 take a case. In other words, you have breath testing  
2 principles involved, or you have field sobriety  
3 exercise issues. I generally look at all the  
4 discovery that your office provides. Sometimes I  
5 speak to the client, sometimes I don't. And I  
6 generally meet with the attorney and tell him either  
7 I can help you in this case or I can't. And that's  
8 normally the way I prepare for trial.

9 Q. Okay. Going back in time to when you were  
10 at Broward Sheriff's Office; is that correct?

11 A. That's correct, I was.

12 Q. How many times did you administer field  
13 sobriety exercises?

14 A. Thousands, I'm sure.

15 Q. Okay. And what type of exercises did you  
16 administer?

17 A. Well, at which time? When I started as an  
18 officer, obviously, they were different. In 1974  
19 they were a lot different than they are today.

20 Q. Did you administer the walk-and-turn  
21 exercise, the nine-step walk-and-turn exercise?

22 A. At what period of time?

23 THE COURT: Any time.

24 BY MS. FAERBER:

25 \* Q. At any time you were an officer?

1 A. Yes. And that changed over the years, of  
2 course.

3 Q. Did you ever administer the Romberg balance  
4 exercise?

5 A. Sure.

6 Q. Did you ever administer the finger-to-nose  
7 exercise?

8 A. Yes, ma'am.

9 Q. Okay. During the course of your experience  
10 as an officer you made some DUI arrests; is that  
11 correct?

12 A. Yes, ma'am.

13 Q. And would it be fair to say that some of  
14 the people you arrested in those cases were based on  
15 those people's performance on those field sobriety  
16 exercises?

17 A. I would say so.

18 Q. If you know, approximately how many people  
19 did you arrest for DUI when you were an officer?

20 A. Probably about 1,500 over 15 years.

21 Q. And that was 15 years?

22 A. Right.

23 Q. Do you think field sobriety exercises are  
24 helpful in determining whether or not someone  
25 impaired by alcohol, whether or not they should be

1 driving a car?

2 A. I think that they can be of help, yes, to  
3 an officer, depending on how he administers them, or  
4 how he or she administers them and what their  
5 knowledge is. Sure.

6 Q. You talk about what their knowledge is. So  
7 if someone has a lot of experience and training  
8 giving these exercises, they are probably really  
9 helpful, helping that officer determine if someone is  
10 impaired?

11 A. I wouldn't say that they are -- an officer  
12 I think is the word you used, is really good and  
13 knows his job. I think that it would probably assist  
14 him. In other words he's able to make maybe a better  
15 evaluation than an officer who's not trained as well,  
16 but I would still expected all the other factors to  
17 be present as well.

18 Q. Of course. But as far as focusing on field  
19 sobriety exercises, if this is an officer with  
20 experience, you know, his observations and the  
21 defendant's performance on the exercises helps the  
22 officer determine if that suspect is impaired?

23 A. Again, it would be helpful, I think, yes.

24 Q. Do you think if someone was on a task  
25 force, a DUI task force, that would be someone who's

1 pretty well qualified to administer those exercises  
2 and to make a determination?

3 A. Sometimes it is, yes.

4 Q. Possibly more than an officer who's just on  
5 regular road patrol and doesn't do as many DUI  
6 arrests?

7 A. It depends on the officer, but normally  
8 someone who works the task force is generally better  
9 trained. Not always, but generally.

10 Q. Let me ask you this. Let's assume you're  
11 going back in time and you're an officer and you have  
12 got -- you were called to the scene. You got a  
13 suspected person of DUI, officer tells you, you see  
14 him weaving around on the road, he drove a little on  
15 the sidewalk, you know, we stopped him, wrote him  
16 some tickets, we smelled some alcohol on the breath  
17 and we're calling you, could you do a D.U.I.  
18 investigation. What would you do as part of your DUI  
19 investigation to make a determination as to whether  
20 or not this person is in fact impaired by alcohol?

21 A. I would then do my own independent  
22 investigation; probably remove the person from, you  
23 know, the immediate area where the other officers  
24 are, and then conduct my own evaluation; probably  
25 talk to him for several minutes, and then conduct an

1 evaluation.

2 Q. Would you ask him to perform field sobriety  
3 exercises?

4 A. If I felt after speaking with him that it  
5 was my determination that he possibly would be  
6 impaired, yes, I would.

7 Q. Okay. You mentioned before that you teach  
8 other officers how to administer field sobriety  
9 exercises. Do you still do that?

10 A. No, I don't do that now. I think I haven't  
11 done that in about the past two years. I don't have  
12 time to teach that anymore. I did my term.

13 Q. And was that volunteer work or did you get  
14 paid for that?

15 A. Nine of the years I was paid. The last  
16 year I did it on a voluntary basis. That was just my  
17 only personal reason why I did it on volunteer basis,  
18 but I did -- I taught for free the last year I taught  
19 that class, those classes.

20 Q. Let me ask you this: Based on your  
21 experience and training, if administered properly do  
22 you think the one-leg stand exercise is an accurate  
23 and reliable exercise to determine whether or not  
24 someone's impaired? I know it's only one exercise.

25 A. I think that -- I don't know. Maybe I

1 wouldn't use the same words as you, but I am going to  
2 say I think it's a good evaluation for the officer to  
3 make if it's given properly, instructed properly, and  
4 the officer makes correct observations, yes, I do.

5 Q. Okay. Based on your experience do you  
6 believe the finger-to-nose exercise -- do you believe  
7 that's an accurate and reliable exercise?

8 A. No.

9 Q. No?

10 A. No, I don't.

11 Q. Okay. Why not?

12 A. Because there are studies that I have read  
13 or been familiar with with that particular exercise  
14 that has indicated that as many people who are  
15 totally sober as are impaired fail that particular  
16 exam. There are no -- there's not one good study on  
17 that particular exercise anywhere indicating that  
18 it's reliable, that I'm aware of.

19 Q. So if it was your investigation you  
20 wouldn't ask someone to do that one?

21 A. No. I have not since 1984, no.

22 Q. What about in the walk-the-line test, the  
23 nine-step walk-the-line and you turn; what do you  
24 think about that exercise?

25 A. The walk and turn test?



1 Q. Yes.

2 A. I would say again that's another indicator  
3 that an officer who administers that correctly and  
4 properly and makes evaluation and all that correct  
5 that certainly would be an indicator to the officer.

6 Q. Now, on the exercise that I just asked you  
7 about that you did not like, the finger-to-nose, do  
8 you know, and this is only if you know, is that an  
9 exercise that is approved by police departments which  
10 officers are trained to administer still to this day,  
11 despite your dissatisfaction?

12 A. It is approved by certainly most  
13 departments, yes. Is it approved by the federal  
14 government, no.

15 Q. By local police departments?

16 A. Sure. A police department can approve  
17 anything they want. They can approve spitting on the  
18 sidewalk if they want. It doesn't matter.

19 Q. We're not going to go into spitting.

20 A. Okay.

21 Q. How about horizontal gaze nystagmus?

22 A. That is a government approved one. That is  
23 an approved one also.

24 Q. By the federal government?

25 A. Yes, it is.

1 Q. It doesn't involve spitting.

2 The defendant in this case, Mr. Ponce, did  
3 you meet with him outside the court prior to  
4 testifying?

5 A. No, I have never met him or spoke with him.

6 Q. Okay. You haven't spoken to him. Do you  
7 think you might be in a little bit better position to  
8 talk about the facts of this case if you had been  
9 present when the defendant was arrested?

10 A. If I would have been there on the scene?

11 Q. You would have been there or maybe when he  
12 did the breath results if you would have been present  
13 at that time?

14 A. I'm sure, yeah. If all of us would have  
15 been it probably would have been, yes, ma'am.

16 Q. And why do you think that would be better?

17 A. Well, just to know exactly what the  
18 procedures were, how they were done, what his  
19 appearance was.

20 Q. Make firsthand observations?

21 A. Firsthand observations. Sure.

22 Q. Officer -- former officer Swope, and let me  
23 ask you this. Is it your experience through your  
24 education, does alcohol effect people's ability to  
25 remember and follow instructions?

1 A. It can, yes, ma'am.

2 Q. It can. Mr. Swope, would you agree that  
3 someone who is properly -- a properly trained officer  
4 who is on hand on the night in question, who was  
5 present at the arrest, he would probably be the best  
6 person to testify about the defendant's condition on  
7 that night whether or not he was impaired?

8 A. As far as the observations made at the  
9 scene I would say that he certainly would be in a  
10 good position as far as being able to relay what he  
11 smelled and what he observed firsthand. Sure.

12 Q. Okay. Let's go back to when you were a  
13 breath tech operator. About how many breath tests  
14 did you administer?

15 A. Well over 10,000.

16 Q. Okay.

17 A. Not just to subjects, I mean through  
18 testing and everything else.

19 Q. Testing and to people as well?

20 A. Right.

21 Q. Are you a certified breath testing  
22 investigator?

23 A. No, mine expired in '96, '95, somewhere in  
24 there.

25 Q. Okay. Were you ever certified to do the

1 maintenance on those instruments?

2 A. Yes.

3 Q. Okay.

4 A. At the time, so you're aware, at the time  
5 there was no special permit when I was an officer. I  
6 believe there is now a maintenance permit, but at  
7 that time there wasn't.

8 Q. Mr. Swope, let me ask you this. If you  
9 were to review the documents that were -- well, let  
10 me tell you this. If the breathalyzer, the  
11 Intoxilyzer 5000, the instrument that was used in  
12 this case, it passed its monthly inspections for the  
13 month before and the month half this defendant gave a  
14 breath sample, and also passed its yearly inspection,  
15 knowing that would you agree that the instrument is  
16 capable of measuring the alcohol content of the air  
17 that was introduced into its chamber, which it  
18 measured by producing a breath card which read 137,  
19 134?

20 A. Is it capable of doing that? Sure.

21 Q. Okay. You mentioned during direct  
22 examination that during the field sobriety exercises  
23 poor instructions could effect how someone performs  
24 on those exercises. What if someone was properly  
25 instructed on how to do an exercise and they didn't

1 do so well? Could it be because they were impaired  
2 by alcohol?

3 A. That could be one of the things, yes.

4 Sure.

5 Q. And you indicated on direct that medication  
6 could effect someone, how they performed on these  
7 exercise. Isn't it true that alcohol effects people  
8 and how they perform on these exercises?

9 A. Yes, it does.

10 Q. And defense counsel asked you questions  
11 wherein if someone had the need to go to the  
12 bathroom, they needed to urinate and how that could  
13 effect their ability to perform the exercise. Let me  
14 throw you a hypothetical. Let's say this person has  
15 to use the bathroom and is given the opportunity to  
16 go to the bathroom, come back and do the exercise,  
17 and they don't do so well, could it be because they  
18 are impaired by alcohol and not because -- well,  
19 could it be because of alcohol?

20 A. Could be. Sure.

21 Q. The need to go to the bathroom could effect  
22 them, but if they perform these exercises and the  
23 evaluations are based on someone's exercises after  
24 they have gone to the bathroom, is the need to go to  
25 the bathroom any sort of factor in this?

1 A. Well, I guess from the way that you put it  
2 to me, no. It sounds like, in other words --

3 Q. The situation was taken care of.

4 A. In other words, if the individual went to  
5 the bathroom and then came back it probably wouldn't  
6 effect their performance.

7 Q. You also mentioned that people have a  
8 natural sway.

9 A. I don't think I used that word exactly. I  
10 think I was asked that question and I said some  
11 people, yeah.

12 Q. Some people have a natural sway?

13 A. Right.

14 Q. Is it like this (indicating)?

15 A. Usually not noticeable, no.

16 Q. Not noticeable. If someone was to notice a  
17 sway in someone could it be from alcohol? Could it  
18 be someone swaying because of alcohol?

19 A. Well, it could be. Sure.

20 Q. You also explained during direct that  
21 there's other reasons that someone's eyes could be  
22 red or glassy; their face could be flushed. Is there  
23 another explanation for odor of alcohol on someone's  
24 breath, especially when that person has admitted to  
25 having a drink?

1       A.    Well, if someone admitted to me they had a  
2 drink I would expect an odor of alcohol.

3       Q.    You also talked about as acetone and how it  
4 affects the instrument, the Intoxilyzer 5000. And  
5 you also said that more diabetics can have acetone,  
6 and you said that other people could have acetone.  
7 What other people could have acetone in their mouth?

8       A.    Well, I am talking about -- I believe the  
9 way I understood it was that if there is other  
10 chemicals and, you know, people can have toluene in  
11 their system and other things like that. I think I  
12 mentioned to the jury that painters and things like  
13 that can have chemical --

14       Q.    Let's go back to toluene. What is that?

15       A.    It's in paint. In other words kind of the  
16 odor you get from paint. Some people like the odor,  
17 some don't. It's actually a chemical. Paint has  
18 many chemicals in it, but toluene is the most  
19 prominent one. It's actually a chemical close to  
20 alcohol. It's on the same wavelength and you can  
21 get -- actually painters have it in their system a  
22 lot where it will be in their system, and they  
23 actually will blow positive on the Intoxilyzer.

24       Q.    To your knowledge is the defendant a  
25 painter?

1 A. I don't know. I haven't spoken to him.

2 Q. Other than paint how else could you have  
3 acetone?

4 A. Acetone. Obviously if someone is diabetic,  
5 has a medical condition, that would have acetone in  
6 their system.

7 Q. What kind of medical condition could create  
8 acetone?

9 A. Diabetic. That would be the main thing.

10 Q. Is the defendant a diabetic to your  
11 knowledge?

12 A. I have no idea.

13 Q. Did the machine -- would the Intoxilyzer  
14 5000, would it produce a breath part -- as far as you  
15 know was there any sort of acetone detected?

16 A. If it was detected it would print  
17 interferent or interferent subtracted, one or the  
18 other, if it was detected.

19 Q. Okay. Wouldn't it print out a result  
20 though if there was any sort of interference?

21 A. Well, again, if it was detected, if the  
22 machine detected it. If it didn't detect it or it  
23 didn't pick it up, no, it wouldn't print it out.

24 Q. Okay. Going back to when you were a breath  
25 tech and people came in and you were administering