

TESTIMONY OF
TERRY ROBINSON
TECHNICAL SUPERVISOR
MAY 9, 2005

TERRY ROBINSON,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BOYD:

Q. Okay. What is your position regarding the breath test instruments here in Dallas?

A. I'm one of the Technical Supervisors at the Institute of Forensic Sciences, Technical Supervisor Area 23.

Q. Okay. Now, all we know in this case, as far as our retrograde factors, was that this man was pulled over at 9:30. The police officer established this gentleman weighs 235 pounds. He was arrested at 9:45 and then he tested. You got your technical supervisor affidavit and the breath test printout which, I believe, is going to show that at 22:28 he tested .12 and at 22:30 he tested at .118. Can you tell us what his alcohol concentration was at 9:30 when he was pulled over?

A. No -- at 9:30 when he was stopped, no, sir, I cannot.

Q. Could it have been under .08?

A. It could have.

Q. Okay. So if he had his last drink right before he stopped, he could have easily been under a .08; is that correct?

A. If he had a dose of alcohol shortly prior to that, it is possible, yes.

Q. Okay. So all you can really say is it could have been higher, it could have been lower, it could have been the same; is that correct?

A. Correct.

Q. Okay. You just -- you just don't have sufficient data to do what is called retrograde extrapolation in this case, do you?

A. Yes, sir, that's correct.

Q. Okay. Now, recently your technical supervisors in Dallas were unable to appear at certain ALR hearings and cancelled several trials at Crowley until further notice. Can you tell us why that was?

A. We had an issue with a couple of instruments at the Sterrett Center that we at that time could not explain what had occurred, so that we had suspended our testimony until ourselves, along with the cooperation of the Department of Public Safety, could figure out what was going on.

Q. Okay. And that was two instruments, now; is that correct?

A. Yes.

Q. Okay. Did both of those instruments -- were they involved in that same transaction?

A. Yes, they were.

Q. Okay. It was that same evening?

A. Yes.

Q. Okay. They tested a person on one instrument and then went over and tested them on another instrument and a PBT; is that correct?

A. Yes.

Q. Okay. And did you ever get to the bottom of what happened to those two instruments?

A. Yes.

Q. Okay. Now, those instruments, were they both the new EN model intoxilyzer?

A. Yes, sir.

Q. Okay. And that was on March 5th; is that correct?

A. Correct.

Q. And can you tell us what happened?

A. Well, just to kind of be brief, the Department of Public Safety found an issue with the EN concerning a valve between the internal breath tube and the sample chamber and they could reproduce the situation at will through the problem with this valve. And what they found was that the valve was sticking and that the sample introduced never got to the sample chamber and that's why the result of the first analysis that they did on that subject was zero both times.

Q. Okay. Now, is this a situation where somebody blew in the instrument and it is actually producing the tone, saying the sample is going into the machine?

A. Yes, sir.

Q. And was there a number of asterisks, one or more asterisks, coming up on the LED --

A. I'm sorry. Probably, yes.

Q. Okay. So you have like a flow meter?

A. Flow sensor.

Q. A flow sensor, that's saying, yes, I'm receiving -- the machine is saying, yes, I'm receiving a sample; is that correct?

A. Yes, correct.

Q. So from all intents and purposes, it looks like that the thing was receiving a sample?

A. It did as far as the flow sensor was concerned. It never got into the sample chamber.

Q. Okay. So the flow sensor just measures something that is going through the breath tube and not measuring something that is going into the sample chamber?

A. Correct.

Q. Is that an engineering problem?

A. Um, I would say that that's probably not the best place in the world to put that particular device is at the beginning of the sampling system, rather than at the end of it. But that's -- that's where it is.

Q. Okay. And that produced what you would call a false negative; is that correct?

A. Yes.

Q. Are you aware of any situations where the machine has produced -- this new machine produced a false positive or something that showed a higher alcohol concentration than what the person was actually blowing into the instrument?

A. No, I'm not aware of that.

Q. How would you even know that, though, if it did that?

A. If it produced a false high?

Q. A false high.

A. Um, we probably -- we probably wouldn't specifically know that, other than the reference analysis being correct and the instrument being calibrated properly. We did find with this particular situation that the sample, if there is a problem with the valve, that there will be no false positive. It will, in fact, register 0.000 each time, again, because the alcohol concentration or the alcohol sample is not getting to the sample chamber.

Q. But the simulator -- let's talk about the simulator a minute. The simulator bypasses the flow sensor, doesn't it?

A. It's -- yes, it does.

Q. It's injected directly into the sample chamber, isn't it?

A. It goes through a valve and then through a short tube and then the sample chamber.

Q. But that's not the case with the subject that's blowing in, like Mr. †Doe. That's not the case with him, is it?

A. No, sir.

Q. Okay. That is -- that's what goes through the flow sensor?

A. Correct.

Q. So it's possible that the simulator solution is going directly into the sample chamber, would be saying, okay, I'm supposed to be a .08 and it says a .078, so everything is cool, but the subject is wrong. It's not going in there, correct?

A. Again, it varies -- there's a possibility that it could be lower, more than likely zero. I don't believe that any of these cases -- in any of these cases that the alcohol concentration is -- is too high.

Q. Okay. But have you ever in any of these situations gone in there and tested a subject while he simultaneously drew blood to see if it was matching up, as far as the subjects go, with the printout from the intoxilyzer?

A. Not on subject tests, no, not running our instruments, we have not done that.

Q. When was the last time that y'all participated in any type of activity where you actually compare subject samples, blood and alcohol -- blood alcohol and breath alcohol being taken simultaneously?

MS. MORRIS: Objection, relevance.

MR. BOYD: We've got a problem here, Your Honor.

MS. MORRIS: He's also limited to the last time.

THE COURT: Sustained.

Q. (By Mr. Boyd) Okay. So the instrument, the only way that y'all were able to tell that the instrument was giving a false negative is because you tested him on the PBT and another intoxilyzer and you came up with a discrepancy?

A. That, and the -- just the experience of the officers involved.

Q. Okay. Now, what did all this have to do, as far as your problem, have to do with the flow sensor being set low?

A. Um, the flow sensor is at the beginning of the sampling system and it's not a mechanical device. It basically has a rubber diaphragm and the blow -- the pressure with which the subject blows is determined by the deflection of that diaphragm in that flow sensor and with the valve closed. In other words, the sample chamber is basically plugged and the sample is basically being blown into the internal breath tube only. It's possible for that subject to blow long enough and steadily enough, even though it was a very, very light blow, to deflect that diaphragm in that one sensor and not collect it for that instrument to interpret that as having provided the sample with sufficient pressure.

Q. What have you done to remedy this situation with these ENs?

A. Well, we're in the process of purchasing equipment to calibrate the -- calibrate the flow sensors. And as far as the valve goes, the instruments are at CMI, the one involved in this case, and we're waiting to hear something from them about what they plan to do.

Q. Did you essentially have to shut down the breath alcohol program here in Dallas for a couple of weeks because of this?

A. We just told the District Attorney's Office we couldn't testify until we found out what was going on.

Q. And this is because of, really, one defective instrument; is that correct?

A. I don't know if the instrument was defective or not. That's what we're waiting to hear. All we know is that the valve was stuck and produced a reading that was --

Q. Was it this instrument?

A. No.

Q. It was one of the other instruments?

A. Yes.

Q. Do they all appear to be similarly defective?

A. No -- again, I don't believe they are defective at all. They just, for whatever reason, in that particular test and that was one test out of nearly half a million that the Department of Public Safety reviewed and found the scenario and performed tests (inaudible).

Q. Okay. Now, you have also had several ENs that were shipped from CMI to you to SWIFS in a defective condition due to the heater element in the sample chamber; is that correct?

A. Well, I wouldn't really call them defective. It was something that we -- we had to or we -- (inaudible) -- ourselves found that the sample chamber wasn't being heated uniformly like it is in the 68, so all we did was reposition the heater tape.

Q. So this was a change they made from the first five thousand to the EN that they didn't completely heat the sample chamber in the EN?

A. Well, the biggest -- the change is that the sample chamber, as far as what it's made of and the part itself, is much different than it is in the 68.

Q. Okay. What are the principle differences between this five thousand, the older model, and this new EN?

A. Um, the sample chamber again, it's much -- it's thinner walled. The idea there is that for it to be able to heat up much more quickly because it does have a standby mode, which can be utilized if chosen to do so.

Q. So let me interject something. So CMI made a change a totally -- an engineering change in the five thousand from the (inaudible) to the EN to make it where it would actually heat up quicker, but by

installing a heater element that didn't go the entire length and breadth of the sample chamber, but actually did not accomplish that and is actually not heating up thoroughly?

A. Well, it's heating up thoroughly, but it's not doing it uniformly, at least it wasn't in our opinion, because of a temperature difference we found from one end to the other.

Q. So was that another engineering problem with the EN?

A. I'm not -- I'm not sure. I'm not an engineer. Just from my experience, though, we thought that there was a better way and that's why we changed it, why we took the heater tape and rerouted the sample chamber so that the tape, rather than being all bunched up at one end, went from one end to the other.

Q. So you have actually modified the instrument that CMI shipped you?

A. According to regulations, that's not a modification. It's a change that we received approval for from the Scientific Director.

Q. And you have also experienced software problems with the ENs, haven't you?

A. Not anything that -- that will occur or is allowed to occur in the instrument and let the testing procedure continue. We've seen things that have occurred during the circuitry check that we haven't seen in the past and it will stop it at that point and it will not allow it to go any farther. We have seen two processor errors that we have not seen before.

Q. What are they?

A. Processor error 3 and 4. And --

Q. What are those?

A. We don't know what they were.

Q. You don't know what they are?

A. That's what I mean. That's what I said. We have seen things that we didn't know what they were.
THE COURT: This is side two.

Q. (By Mr. Boyd) So, now, did you obtain a new owner's manual and a new technical manual for the ENs from CMI?

A. We don't have an owner's manual. We have a technical manual for the EN, yes, sir.

Q. And it doesn't list this -- this error 3 and 4?

A. Not for our software, no, sir.

Q. Okay. So you have got errors coming up that are encoded by CMI that are coming up with a specific display, but you don't know what they are?

A. What happened was, is -- or what we found out was that the processor error 3 and 4 were coming up when they shouldn't be. And the problem that was associated with it was a motor speed problem. In other words, when the motor starts to go out, it will give that particular reading, instead of what it should have been showing.

Q. Are you talking about the chopper mode?

A. Yes, sir.

Q. And that's what drives the filter wheel?

A. Yes, sir.

Q. Okay. So if the filter wheel is being driven incorrectly, that could affect the result, couldn't it?

A. No, it's not being driven incorrectly. What it's doing is the instrument, when there is a problem with the filter wheel, as far as its stability, in other words, it's consistent revolutions per minute, the instrument was misidentifying the problem or the motor was starting to go bad and then the motor speed was fluctuating, rather than showing the processor, and it should have been showing was showing processor error 3 and 4.

Q. Okay. But if the motor is not running the speed it's supposed to be running, couldn't that cause a false result?

A. It won't pass -- no, it won't show a false result. It would not pass the circuitry check, if it's doing that.

Q. But what if it's already past the circuitry check and it's during the actual test?

A. Um, if the motor goes out at that point --

Q. No, if it's just going slower than you thought.

A. Um --

Q. Turning the filter wheel partly into the path of the light, but not totally?

A. Well, it's turning it over 2400 revolutions per minute, near 2400 revolutions per minute, so it's still going to be turning. It's going to be -- it's going to be rotating. If there's a problem and the motor goes out, the revolutions per minute will increase and decrease at a very rapid pace. And if it's doing that, it will not allow the instrument to pass the circuitry check. If it's during the analysis when that particular thing happens, it will not -- it will not allow the instrument to go any further because it will indicate the signal being received by the instrument CPU board -- or processor board, rather, is unstable and it will -- it will stop the test at that point.

Q. Did CMI add a larger diameter breath testing tube to the EN?

A. No. It's the same diameter that was on the 68s.

Q. Okay. Now, recently the Scientific Director of the Department of Public Safety forced you to change data management systems to a DPS system; is that correct?

A. They pretty much mandated that we change (inaudible) everyone else has

Q. Okay. They forced you to delete, actually -- you had a more complete data management system as far as you were accounting for every daily modem check and all of that, weren't you?

A. There are things that we could do with that older system that we cannot do as far as generating information.

Q. And did you bring the maintenance records (inaudible) to those now --

A. Yes, sir.

Q. -- your handwritten stuff?

A. I don't have any handwritten stuff, no. The biggest difference between what we have now and what we had is that this system will only allow us to generate reports that include on-site inspections.

Q. Okay.

A. We can no longer -- we can still call the instruments every day and do modem checks, but we don't have any way to retain that data or print that data out in the report format.

Q. Okay. But this preceded those data management changes that the Scientific Director forced you to make; is that correct?

A. I'm sorry, I don't -- what preceded what?

Q. Did you have records related to this test, because this test happened on November 30th. When did they force you -- when did the Scientific Director of the Department of Public Safety force you to change your data management system so it would no longer produce as much or as good data?

A. It was in April of 2005, about a month ago.

Q. Okay. So you already had all of this data before he forced you to do that; is that correct?

A. Yes.

Q. Okay.

MR. BOYD: I'm going to offer this as DX-1, existing of five pages.

MS. MORRIS: No objection.

THE COURT: It's admitted. One more question?

MR. BOYD: Yes, I have one more.

Q. (By Mr. Boyd) Now, did they generate a memo or an e-mail telling you what you had to do as far as --

MS. MORRIS: Objection, relevance.

THE COURT: Overruled. We've gone this far.

Q. (By Mr. Boyd) Did the Scientific Director generate a memo or an e-mail or something of that nature, ordering you to change data management systems?

A. No. They didn't order us to do it through any kind of an e-mail. It's been an ongoing process for over a year and a half, one of three programs in the State that does management.

Q. Did they just tell you verbally, change it?

A. Well, it was either -- we were pretty much told that by annual renewal this year in August and September -- or September and October, that we would have to do it, if we didn't already have it by then.

THE COURT: Any further questions, Ms. †Morris?

CROSS-EXAMINATION BY MS. MORRIS:

Q. One further question that's not been established. Was the instrument that was used for Mr. †Henry's test an EN?

A. Yes.

MS. MORRIS: Thank you. Nothing further.

[End of Testimony]

STATE OF TEXAS *

COUNTY OF DALLAS *

I, NANCY BREWER, Certified Court Reporter, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the testimony of Terry Robinson as transcribed from audio tapes, to the best of my ability.

SUBSCRIBED to by me on this the 16th day of May, 2005.

My Commission Expires 12-31-2006