

RECORD FROM AUDIOTAPED PROCEEDINGS VOLUME 1 of 1 VOLUME
Administrative Hearing No. 2005-03-27104
TEXAS DEPARTMENT OF : IN THE STATE OFFICE PUBLIC SAFETY :
VS. : DEFENDANT

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TESTIMONY OF CRISTI SWEARENGIN FROM AUDIOTAPED PROCEEDINGS
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On the 13th day of July, 2005, the following proceedings came on to be heard in the above-entitled and numbered cause before Brenda Coleman, Administrative Law Judge presiding, held in Dallas, Dallas County, Texas: Trisha L. Phillips, Official Court Reporter (214) 653-5656

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

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I N D E X

Partial Proceedings held July 13, 2005
Defense Witness Direct
Cristi Swearingin
Trisha L. Phillips, Official Court Reporter (214) 653-5656

(Partial proceedings held July 13, 2005.)

THE COURT: We are back on the record, and we're joined by the breath test technical supervisor. Would you please state and spell your name for the record?

THE WITNESS: Cristi Swearingin, C-R-I-S-T-I, S-W-E-A-R-E-N-G-I-N.

THE COURT: Please raise your right hand,
Ms. Swearingin.

(Witness sworn.)

THE COURT: Thank you.

THE WITNESS: Thank you.

THE COURT: Mr. Boyd.

CHRISTI SWEARENGIN, having been first duly sworn, testified as follows:
DIRECT EXAMINATION BY MR. BOYD:

Q. Okay, Cristi. Earlier in the hallway, you gave me your maintenance records pertaining to instrument number 12535, five pages; is that correct?

A. Yes.

Q. Okay. Now, this is not the full amount of information that I used to get from SWIFS as far as the way you use the instruments. Usually I got the daily modem checks and everything. I didn't get that. Can you explain why I no longer get the daily modem checks from SWIFS?

A. Yes.

Q. Why is that?

A. That's because of our new software. We have new system software that no longer allows us to keep those running checks. We look at it daily, and the data is -- seems to be expunged. (Inaudible).

Q. Okay. Now, SWIFS used to keep that data, didn't it?

A. That's correct.

Q. You didn't have any trouble with the instrumentation keeping that data, did you?

A. It was more of a software program on our computers that we had. It was a lot different than this particular program, but we are required by DPS to use this, which is the management system, so I have those rules and guidelines that I have to essentially do what they say. This is what they want us to use.

Q. Okay. So the Department of Public Safety scientific director, Max Cohen, essentially told you at SWIFS --

MS. WELLS: Objection to relevance of the record keeping of the Department.

MR. BOYD: I think I'm entitled to get into it, Your Honor. We're going to go into this in a minute, that this instrument tries -- this class of instrument started showing problems even before this test, that they knew about it, and that it's been taken out of service since then.

THE COURT: Okay. I'm going to overrule the objection. I believe you were about to basically just restate what her answer was.

Q. (By Mr. Boyd) Essentially, the scientific director ordered you at SWIFS to keep less data available to defense attorneys than you were keeping before; is that correct?

A. They load the program. That's all I can say about it, but it does -- (End of tape one, side one.)

THE WITNESS: Okay.

Q. (By Mr. Boyd) Okay. Could that in any way cause or produce this invalid test? (Inaudible).

A. It could be possible depending on the facts, if she couldn't breathe properly, if "insufficient sample" means she did not satisfy the slope at the time or the pressure required to meet the minimum sample on the intoxilyzer. So, yes, it could be possible.

Q. Okay. So that could be completely involuntary on her part, couldn't it?

A. Absolutely.

Q. A person may not necessarily know, that was giving an intoxilyzer test for the first time, how to cause the machine to produce an invalid test, could they?

A. No.

Q. Okay. And that means they just were unable to blow sufficiently with sufficient pressure and time on the first breath test; isn't that correct?

A. It could be the first. It could be the second. I don't know which one it occurred in.

Q. Okay. So there is no way to tell from this slip?

A. That's correct.

Q. Okay. Which isn't the same thing for .02 disagreement, is it?

A. No, it's totally different.

Q. Okay. And it could be either breath, that she wasn't able to blow sufficient pressure, sufficient length of time to satisfy the slope detector, concluding with invalid test?

A. Yes.

Q. Okay. Could this in any way be the result of the sticking pressure switch that we've come to understand is the problem with the EN machine that did the test, one of those?

A. No, because the error always reported a zero breath alcohol test.

Q. Okay. Now, on the date of this test, that was November 30th; is that correct?

A. Yes, that's correct.

Q. Okay. But on September 28th, 2004, you experienced the first of your zero -- your false zero tests on the similar instrument of the EN; is that correct?

A. That's correct.

Q. So at that point, you were already having the results that were demonstrably false from the instrument and you had already determined that you couldn't reproduce that result at least in your lab yet?

A. Not in September. They were always false negative results. They were never false positives. We did not catch it until March 5th of 2005.

Q. Okay. Now, in response to having the false results from the five digit intoxilyzer instruments in your -- under your supervision, did you take that class of instrument out of service?

A. No.

Q. You never did?

A. Not all of them. I only took the two in March that we felt were in question at that time.

Q. Okay. And which instruments were those? They were number 12661 and 12830?

A. 12830, 12 -- is it 918?

Q. I've got --

A. Be sure it's our area because it happened -- what you're looking at is everyone that happened in the entire State of Texas. Make sure that it's the one from our area and not the one that's from South Texas.

Q. Okay.

A. 12830, and then the one that's with 12830.

Q. 12833? No, I wrote it down. So you only took those two instruments out of service?

A. It's 12830 and 12918. It's the two bottom two right there. Those are our instruments.

Q. So you took those two instruments out of service?

A. Yes, sir.

Q. Did they remain out of service?

A. They continue to remain out of service.

Q. So those instruments, are they staying out of service and they were in a crate somewhere, in a closet somewhere at SWIFS; is that correct?

A. Not in a closet. They're still in my lab though.

Q. Okay. Are you still using five digit EN machines?

A. Yes, I am.

Q. Is this one still in service, the one that was used in this case?

A. This particular instrument is actually a Dallas County spare instrument. It may not be in service right now, but, yes, it is available to be used at anytime.

Q. Now, when you took those two instruments out of service, did you ever determine whether or not there was anything unique to those two instruments that wasn't common to all the other five digit intoxilyzers that end with EN?

A. I think the answer to that question is no. There is nothing special about those two instruments. There is nothing unique. The problem is just it's a design flaw that is with those instruments, and it's got to be changed. It's just a bad -- it's a bad part in them.

Q. Okay. But you took those two instruments out of service because of this problem, the design flaw?

A. Yes.

Q. But you didn't take the remaining instruments that had exactly that same design flaw out of service and you continue to use those for breath testing purposes; is that correct?

A. That's correct.

Q. Okay. And that chief part, we're talking about the check valve; is that correct?

A. That's correct.

Q. And that's a check valve that's in between the mouthpiece and the sample chamber; is that correct?

A. Yes, but it's right next to the sample chamber. I mean, between the mouthpiece and sample chamber is a long way. It's right next to the sample chamber.

Q. Is there another check valve on the other end of the sample chamber?

A. Yes.

Q. And is it the same chief part?

A. No, it's a different part.

Q. Okay. Have you checked the one that's on the aft end of the sample chamber to see whether it can experience the same problem of sticking due to someone sucking into a mouthpiece?

A. I have not checked that, but the scientific director's office has checked that, and they have found that they could not duplicate it.

Q. Okay. Now does it essentially function the same way as the first check valve?

A. No, it's different.

Q. How --

A. It's a completely different part. It's a different design.

Q. Okay. Now, the first check valve, what is that design? Explain it to us in simple laymen's terms.

A. Okay. It stays closed. It will let air to pass through in one direction, but it will not allow air to come back through the other direction.

Q. Okay. What happens if a person is, like -- well, somebody with asthma is sucking in the mouthpiece while they're having some sort of spasm, they could actually cause that check valve to close; is that right?

A. That's correct.

Q. And then the breath, instead of being -- going to the sample chamber, it just goes somewhere into the instrument?

A. It never makes it to the sample chamber. That's why we get a false negative result. The breath sample will never make it to the sample chamber; therefore, when it reads it, it always reads a zero.

Q. But yet the pressure valve and the slope detector are satisfied; is that correct?

A. That's correct.

Q. Is that because the breath goes through those units before it gets to the check valve?

A. That's correct.

Q. Okay. So the breath is being analyzed to some extent for pressure and to see if it's rapidly fluctuating in terms of its alcohol concentration. But then it goes into the sample chamber, but the actual breath the person is exhaling is going out somewhere else in the instrument or into the housing of the instrument somewhere, not getting into the sample chamber?

A. It stays right there in the breath tube. It never make it into the sample chamber.

Q. Does it pressurize the breath tube?

A. Essentially, yeah, you kind of are building up a pressure, but they are not really providing enough of a sample to fill up the breath tube, because the instrument will read it very quickly. If no breath makes it in, the instrument takes the reading very quickly. That's why we're getting false negative results. It's never reading the sample.

Q. So the slope detector is analyzing the breath too, isn't it?

A. It is, but it's done before that. It's analyzed before that. That's why I say it's just a design flaw that they are going to have to change.

Q. So if the breath is analyzed by the slope detector, what of the instrument is analyzing the breath?

A. It's analyzing what is in the sample chamber, which is not breath. It's just the air remaining from the air blank.

Q. Okay. So the slope detector is satisfied because it's not going up or down or anything. It's staying the same because it's ambient?

A. That's true.

Q. Okay. What happened, okay, if let's say aft end checks out, okay? If it checks off on the aft end of the sample chamber, which you say is a completely different type of switch or valve, okay?

A. Uh-huh.

Q. If this became stuck in the closed position and breath couldn't escape from the sample chamber, would that pressurize the sample chamber?

A. Yes, it could. You could get a build up of pressure, yes. Well, I say yes, but there actually are two valves back there. So if the first one sticks, it goes another way. And then if the second one sticks, then, yes, you could get pressure there. But I mean, the odds of both of those happening at the same time is very, very, very remote. DPS could not produce that result.

Q. But you've tried?

A. We've tried to produce that result to make sure we don't get it.

Q. What would happen if the sample chamber became pressurized?

A. Well, I think the theory is you would get a build up of alcohol concentration in the sample chamber because you could read false high results.

Q. Okay. But you've got two check valves on the aft end of sample chamber; is that correct?

A. That's correct.

Q. Okay. Is either one of them the same thing as the first check valve?

A. No, it's not. It's a totally different part. They look completely different. They have a much better design.

Q. Why don't they put that at the front end of sample chamber?

A. Like I said, it's a design flaw that demands repair.

Q. Okay. Have you approached CMI concerning designing their design flaw in the EN?

A. Yes, we have. Those instruments have been unincorporated for maintenance since that incident, and they are working on repairing that part and making a better part.

Q. Okay. What instruments? All of the EN's?

A. Eventually it will be all of them. Right now it's those two instruments.

Q. Okay. Now, in this particular case, I've talked to Frank. Have y'all ever done -- I know that I've read your manual of the alcohol testing, your little journal of the alcohol testing alliance where you did, you know, some comparisons between breath and blood, okay?

A. Okay.

Q. I mean, did y'all ever consciously have someone try to, let's say, fool the instruments when you were doing that, blow both short and shallow and then long and hard to see if you could vary the results?

A. Okay. I have not personally done those studies. I do not have the time to do that; however, I do know that the scientific director's office has done that. They have also done that with drinking subjects. They had them blow back on the breath tube. They had them do all of those things to see what kind of data would be replicated.

Q. What would be -- to your knowledge, what was the maximum variation they produced by breath technique alone?

A. All we got was negative results. All it could produce was false negatives. They could never reproduce a false positive result.

Q. Okay. But what I'm talking about is just where you have -- not were you breathe in necessarily, but where you're just doing it to see how much you can vary with breath technique alone.

MS. WELLS: Objection, relevance.

THE COURT: I'll overrule at this time.

THE WITNESS: You know, I'm not familiar with -- I do know what you're saying. I'm just not familiar with what exactly everything he's done. I don't know that that's published (inaudible). So I'll have to wait for that to be published. I do know that there has been some (inaudible). I personally have not.

Q. (By Mr. Boyd) Okay. But a breath technique issue, what is the maximum variation that you've ever heard of as far as breath technique alone affecting two subject samples, same subject?

A. If a subject varies by a plus or minus .02, it's not going to be read a valid test. It will be an invalid test. So I don't think I could answer that question. But, you know, on there, you can see on that sheet right there where someone in another area blew like a result, and the next result was a zero, and that was from the same problem.

Q. Sure, the maximum variation you're aware of is 100 percent; is that correct?

A. There you go.

Q. Okay. Now, in this case, we know that the defendant weighs, I believe, 115, according to the officer, okay?

A. Okay.

Q. She told him that she had one glass of wine at the American Airlines Arena when she was pulled over at Stemmons and Mockingbird. She was pulled over at 10:09 p.m., and she was arrested at 10:30 p.m. You have the test results, the invalid test at 10:22 and, apparently, a valid result at 10:30, and you can see those results. And she told him she had one glass of wine. She did not tell him when she drank it. She did not tell him how large a glass of wine it was, and she didn't tell him anything about food, okay, or anything else. Can you tell us what her alcohol concentration was when she was seen driving at 10:09 p.m.?

A. I can't say specifically without knowing the time that she had that last drink, if I heard that correctly.

Q. Right.

A. So she could have been higher. She could have been lower. Or she could have been the same. If she had that last drink just prior to driving, she could have been lower --

Q. Okay.

A. -- than what she was at this test.

Q. Okay. And could she have been less than .08 at the time she was driving?

A. 115 pound woman, that is highly possible that she could have been less than .08 at the time of driving if she had that drink right before she started driving, because the time of the arrest and the time of the test were very close together.

Q. Okay. Particularly when you consider the testimony of the Officer that she had six clues of horizontal gaze nystagmus, but she was looking northbound at Stemmons Freeway exposed to both north and southbound lights. She had only one clue on the walk and turn test, which she didn't -- she missed heel to toe several times; that was it. The one leg stand, she put her foot down once on number 19. So she had one clue. So that did not indicate intoxication. So under the facts of this case, it is totally possible that she was under .08 at the time of driving.

A. Yes, that is possible. I am not an SFST expert. I don't know how to interpret those results. But, yes, of course, it's possible she could have been lower. She could have been higher. She could have been the same.

Q. Okay. But there is no possibility -- from the information that we have, there is no possibility that you could do what's called a retrograde extrapolation in this case, is there?

A. Not and get a result that's anywhere close to a reasonable scientific certainty.

MR. BOYD: Okay. Pass the witness.

MS. WELLS: No questions.

THE COURT: May the witness be released?

MS. WELLS: Yes.

THE COURT: Thank you, have a good day.

THE WITNESS: You too.

(End of requested proceedings.)

I, Trisha L. Phillips, Official Court Reporter, in and for the County Criminal Court Number 6 of Dallas County, State of Texas, certify that the foregoing is a correct transcription, to the best of my ability, from tape recording of the proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action. I further certify that the transcription fee of \$25.00 will be paid by the Respondent/Defendant.

WITNESS MY OFFICIAL HAND this the 8th day of August, 2005.

TRISHA L. PHILLIPS, Texas CSR# 3953

Expiration Date: 12/31/05

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