APPEARANCES

HONORABLE LUCAS ALLAN
HONORABLE STEVE GEBHARDT
Assistant District Attorneys
401 W. Belknap Street
Fort Worth, Texas 76196
Telephone: (817) 884-1400

Attorney(s)for The State of Texas.

HONORABLE GARY L. MEDLIN
Attorney at Law
1300 South University Drive, Suite 101
Fort Worth, TX 76107
Telephone: (817) 336-3600

Attorney(s) for The Defendant.

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(None marked)

PROCEEDINGS

May 7, 2007
Monday
3:45 p.m.

(Open court, Defendant present, Jury present)

(Direct examination not transcribed)

MARK FONDREN,

having been duly sworn, testified under oath as follows:

CROSS-EXAMINATION

BY MR. MEDLIN:

Q. Mr. Fondren, part of your job is to testify in court in support of the breath testing program in Tarrant County; is that correct?

A. That would be.

Q. And so you're employed by and your salary is paid by the Tarrant County Medical Examiner's Office, which is part of the Tarrant County government or the Tarrant County government agency; is that correct?

A. We are.

Q. Now --

MR. MEDLIN: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q. (By Mr. Medlin) You brought the subject test records with you, did you not, in this case?

A. I have the one test record.

Q. How about the check, the instrument maintenance repair logs?

A. I brought what I needed for my testimony, which was roughly 30 days before and after.

Q. May I review that briefly?

A. Sure.

Q. And the test we're talking about is on September 21st, 2005, and when was the next time that you changed the solution, the reference sample solution?

A. Referring to before or after the test?

Q. After September 21st.

A. After? There.

Q. So that's on --

A. October 24th.

Q. Okay. Thanks. So in between that period of time, September 21st and October 24th, you're getting readings when you check the machine on what it's telling you the reference sample is whenever you check it, right?

A. When you do the modem check, one of the things that would be done, or one of the things that

I do is to run a calibration check.

Q. And it gets different readings from time to time?

A. You do.

Q. It also doesn't always get the .081 that it got on September 21st?

A. Correct. You will have a range. Sometimes it's a little higher. Sometimes it's a little lower. If the solution gets dirty or if it starts getting bad with fungal growth or something like that, we'll actually see it start falling off.

Q. So sometimes you have it showing that the value is greater than .08 and sometimes less than .08; is that fair to say?

A. That would be.

Q. And the fact is it was off by as much as .01 on September 28th; is that correct?

A. On the 28th we ran it, and it was 070.

Q. So it was off by .01; is that correct?

A. .01.

Q. Outside of that margin of what's allowed; is that correct?

A. It would be.

Q. So you have a reference sample in the machine, which can be off by as much as plus or minus

.01, and it's still okay, right?

A. You would have to fall within that window, sure.

Q. And we even see on this particular machine that it was off by as much as .01 at that time, right?

A. Sure. On one day we hit as low as 070.

Q. And the two samples that you get from the subject have to be within .02 of each other; is that correct?

A. They do.

Q. Okay. So if a person has a .08 on their first sample and the second sample could be as high as .10 or as low as .06 and be within that range that's allowed for this machine, right?

A. Sure, if the subject were to provide those samples.

Q. Yeah. You're familiar, aren't you, with -- well, the machine, the solution is supposed to be at a particular temperature; is that right?

A. It is.

Q. And what is that?

A. 34 degrees Celsius.

Q. And it could be a little bit higher or a little bit lower, right?

A. The range has to be plus or minus .2.

Q. .2, okay. And Celsius is a different scale than Fahrenheit, right?

A. Yes.

Q. 34 degrees Celsius, what does that equal in Farenheit, about 93 something?

A. About 92.

Q. About 92? So you change a degree Celsius, and that's like changing about 2 degrees Farenheit generally speaking, right?

A. It's just under two.

Q. Okay. And this machine doesn't measure the temperature of the person giving the breath sample, does it?

A. No.

Q. Now, if the person's breath temperature is higher, then that can increase the score that would result from the same amount of alcohol; is that true?

A. You would have -- it would still be reflected of the alcohol concentration that individual had on the breath sample. It would be a different value as compared to a blood draw taken at the same time.

Q. But another way we can look at that is say a person has a given amount of alcohol, say five

drinks over a given period of time of one hour, and you have another person who is the same weight, same sex, they have all the other factors are the same, they could have the same amount of alcohol, same strength and everything, but if their breath temperature is higher than the others' they could have a higher breath test score; is that right?

A. Sure.

Q. It would be accurate of what's in the breath, but it's higher than another person with the same amount of alcohol, right?

A. Sure. There's a mathematical equation to express that.

Q. And you're familiar with Dr. Jones' work on that, right?

A. Sure.

Q. So if you increase the breath temperature one degree Centigrade, then that results in, what is it, six point --

A. At the .1 level we would see a difference of .006 between the two samples.

Q. .006 would be the actual score difference, correct?

A. For example, if we used .1 -- in the first instance, for example, the simulator ran exactly 34

degrees, and it ran .100. If we then increase the simulator to 35 degrees Celsius, that same solution would then give us a reading of .106.

Q. Okay. And 98.6 degrees Fahrenheit, would you say what that equals in Celsius, about 38?

A. 37.

Q. 37.5 or 37?

A. 37.

Q. Okay. Now, you would agree, wouldn't you, and I think the way you described it earlier, that alcohol affects mental faculties first; isn't that correct?

A. It does.

Q. And you're familiar with Dubowski's work on what symptoms are, what symptoms can be seen at given levels of alcohol concentrations; isn't that correct?

A. Sure.

Q. And when you have two values on a breath test, you typically just accept one of them as being the value that you use in the case?

A. Both have meaning to me.

Q. Okay.

A. And if we're doing mathematical computations and statistics, we'll generally choose the lower of the two values.

Q. Kind of benefit of the doubt kind of thing?

A. We do.

Q. So say at .118, some of the symptoms that we see of alcohol are euphoria; is that right?

A. Sure.

Q. Loss of critical judgment?

A. I would agree.

Q. Decreased inhibitions, talkativeness?

A. Talkativeness in some individuals, sure.

Q. Excitement?

A. Yes.

Q. Memory and comprehension effect, loss?

A. Impairment, yes.

Q. Muscular incoordination?

A. To some degree, yes.

Q. Aggressiveness?

A. Again, in some.

Q. And this breath test, Intoxilizer 5000, the 5000 has been around since the 80's; is that right?

A. Sure.

Q. Granted, it's got different models where they make little tweaks or add filters or things like that, right?

A. A good analogy, much like the Ford F-150. The F-150 truck goes back many years. There are lots of revisions, lots of models. The 5000 is the name that everyone's familiar with.

Q. But the 5000 in this particular case has the same computer chip that's been used since the 80's; is that right?

A. Probably. It may be a slightly different chip. I don't know.

Q. But basically that's the chip that's from the same generation as the chip that ran the Atari home video games, right?

A. Could be.

Q. And it's got an RFI detector; is that correct?

A. Yes.

Q. And that RFI detector is the same one that they've been using since the mid-80's, which was before today's generation of cell phones and all the different frequencies that come from those; is that correct?

A. Whether or not it's the exact same one, I don't know. Definitely the 80's would be before cell phones or things like that.

Q. And this machine runs on a program, right?

A. It does.

Q. But you've never been able to review that program, have you?

A. As for the, like, code level line or reading of things like that, no.

Q. Okay.

A. -- one is well outside of my area of expertise.

Q. But also nobody else has, right?

A. I can't speak for other individuals.

Q. Well, CMI considers it proprietary interest in that they don't allow people to get their program; right?

A. Generally so.

Q. Now, when the machine does an air blank, it basically blows air through the sample chamber, right?

A. It will pull air in following the same path as what a subject's breath sample will.

Q. Which means going through the sample chamber, right?

A. Well, it would go through the external breath tube, the internal breath tube, the cellinoid, and finally the sample chamber.

Q. And then the exhaust port?

A. Correct.

Q. On the back of the machine?

A. Correct.

Q. And you didn't bring one of those with you today, did you, the machine?

A. No, I didn't.

Q. It's actually a little heavy, but you're strong enough to carry it. It's something that could be brought into court to show a jury, isn't it?

A. Other people have, sure.

Q. Do you have any diagrams with you or any pictures of it?

A. No.

Q. The breath tube kind of sticks off to the side of the machine kind of like an arm, almost like a one-armed bandit, but it rotates up and down for ease of the person reaching their mouth level so they can blow into it, right?

A. Sure.

Q. And on the end of the breath tube you have a mouth piece that the operator wants to put a clean one on for each subject; is that right?

A. Correct.

Q. And do you require them to change the mouth piece between the two samples on the same person?

A. No. As long as we just recommend they use the one mouth piece or one clean mouth piece for each individual. If they want to change them between that, that's fine, but at a bare minimum, each individual gets one mouth piece.

Q. But the mouth piece is partly there to try to keep foreign materials from getting into the machine, right?

A. It would, and also the main purpose is sanitary.

Q. Sanitary, okay, so each person has a clean mouth piece to blow on, right?

A. Sure. I wouldn't want to use your mouth piece.

Q. No. No, you wouldn't. In fact, the machine gets used by lots of different people, right?

A. It does.

Q. And maybe John Doe doesn't know who has blown into that machine before him, does he?

A. Like the subject in this case wouldn't. I can look at it and see who provided the samples before.

Q. And that could be a wide assortment of people from different occupations and different walks of life, right?

A. Or it could be me.

Q. And it could be people who are healthy and people who aren't healthy; isn't that right?

A. Sure.

Q. The breath test tube is heated, isn't it?

A. It is.

Q. And actually you've taken some of these machines apart before, and some of the inner workings get a little bit gunked up, don't they?

A. It depends on the environment the instruments are in. Every instrument gets dirty in some form or fashion; if nothing else, just from dust.

Q. Part of that 15 minute presence period, you want to make sure there's no mouth alcohol, right?

A. That's -- sure.

Q. If a person burps or they have gas escaping from the stomach, it could introduce alcohol into the mouth; is that correct?

A. First for alcohol to be a problem, there has to be alcohol present in the stomach. The drinking has to have been relatively recent.

Q. Right.

A. But then it's part of the rules and regulations to ensure against that. We want to make sure they don't regurgitate or anything like that.

Q. Because if that happens, you would want

that 15 minute presence period to start over again, right?

A. If they regurgitate or if they introduce other substances in the mouth, then yes.

Q. To allow whatever it is to dissipate, right?

A. That's right.

Q. Now, the machine has a slope detector, which is supposed to detect mouth alcohol; is that right?

A. It does.

Q. But it doesn't always, does it?

A. When operating correctly, yes.

Q. But it can be defeated, and it's been shown to be defeated, right?

A. Yes. On the older instruments it was very easy to defeat, sure. Just turn it off.

Q. And if a person has something in their mouth, a foreign substance, it ought to be taken out, right?

A. They would, except for certain things. You wouldn't allow a penny to be kept in there. If they have permanent dentures or anything like that, then we would leave those. If they have tongue piercings, we would recommend that those remain intact, but

other things such as chewing tobacco, chewing gum, a mint, all of that would have to be removed.

Q. Ideally you would want no foreign things in the mouth, right?

A. That is correct.

Q. Now, what you were talking about as far as the result, .118, you were talking about that being an expression of grams for 210 liters of breath; is that correct?

A. Correct.

Q. And when we talk about -- .08 is the legal limit, right?

A. It is.

Q. And if we -- so the sample chamber is not 210 liters big, is it?

A. No, it's not.

Q. In fact, 210 liters, for easy understanding, that's a whole lot, right?

A. That's a large volume.

Q. Would be like a 55 gallon drum?

A. Sure.

Q. So we don't have 210 liters in our lungs, do we?

A. Not at one time, no.

Q. Maybe the strongest, Lance Armstrong,

doesn't have more than about six or seven liters?

A. Probably around there.

Q. More than most people, though. So what's in the sample chamber, you can tell the jury about how many CC's that is; isn't that right?

A. Sure, if you would like me to.

Q. Yeah, please.

A. Sample chamber is about 80 or 90 CC's.

Q. So can you kind of give the jury an idea of how it's shaped or what size it is inside the machine?

A. The sample chamber is about 11 inches long. To give a good analogy, a stainless steel pipe. It's about three-quarters of an inch thick. It's about 11 inches long. The internal diameter, or the walls are about three-quarters of an inch thick. The inside opening would be about a half inch. So roughly a half-inch wide by 11 inches long. At one end you have the infrared detector, the other end the infrared source.

Q. So .08 grams, that would be a little less -- if it were in a solid form, that would be a little less than a packet of a Sweet 'N Low; is that right?

A. About a tenth of that.

Q. And what amount of alcohol is in the sample chamber to equal .08 is actually much less than that, isn't it?

A. At the very end of the breath sample, sure.

Q. In fact, you've done the math several times, right?

A. Sure.

Q. Can you go ahead and tell me without going through the calculations, how many zeroes?

A. Probably three or four or five. It's .08 divided by 2,300 roughly.

Q. Have you got your calculator?

A. I don't.

Q. You want to trust mine?

A. That's fine. You have your decimal point, four zeros.

Q. One, two, three, four.

A. And then three.

Q. Okay.

A. We'll stop there.

Q. So that would be -- so that's the decimal point. So you've got tenths, hundredths, thousandths, ten-thousandths, so that's three hundred-thousandths of a gram; is that correct?

A. Of a gram, correct.

Q. Three hundred-thousandths of a gram?

A. Right.

Q. Is how much it would take to be in that sample chamber to equal .08; is that correct?

A. Per 210 liters of breath.

Q. Correct.

A. Yes.

Q. So you agree with me that's a pretty small amount, right?

A. Well, when you express it that way, sure.

Q. You couldn't see it with the naked eye, could you?

A. Actually you could, yes.

Q. Because it's dispersed in a gas?

A. If you look at it in the gas phase, then no, you cannot see it.

Q. Okay. All right. So -- and what you're aiming to get in the breath sample that's analyzed by the machine is the deep alveolar breath; is that correct?

A. We are.

Q. The respiratory system starts out, I guess, at the mouth going down to the trachea to the lungs, right?

A. It does.

Q. The deep alveolar would be the last part of that whole system before the air meets with the blood that's going through the lungs to exchange oxygen; is that correct?

A. That is correct.

Q. And the respiratory system branches about 17 times between there; is that right?

A. I don't know the number of branches. It would be a number of branches, though.

Q. And so the machine is based on the idea that after the subject blows for a period of time that what you're getting is the deep alveolar breath, right?

A. That would be true.

Q. Where it's a good idea is that the blood and breath are in equilibrium as far as the alcohol being exchanged; is that right?

A. That is.

Q. Now, you're familiar with Dr. Michael Hlastala's papers and work in this area; is that correct?

A. To some degree.

Q. Are you familiar with his position in his papers that talk about respiratory science being wrong, that we now know that alcohol is exchanged all

the way through the respiratory system at every level or branch and not just in the deep alveoli?

A. I would say that's always been the belief.

Q. You haven't watched the video in this case, have you?

A. No, I haven't.

Q. Now, if the breath test result is accurate, that may give you the breath alcohol concentration at the time of the test, but not necessarily at some other given time; is that fair to say?

A. I would agree.

Q. And on this particular test, the first sample was at 2:47 a.m.; is that correct?

A. Yes.

Q. And if the driving occurred at 2:00 a.m. or 2:02 a.m., then you need some information, don't you, before you can say or estimate what the .118, excuse me, at 2:47 can tell you about what the breath alcohol concentration would have been at 2:02 a.m.?

A. Well, there are some conclusions we can draw immediately without knowing anything. We can know that it can't be any higher than we're talking 45 minutes, the highest individual is going to be about .135. It could be the same as the test record, but it's a .11 or .12. They could also be lower.

How much lower, that's where I would have to have other information.

Q. You need more information. What kind of information?

A. We want to know when the individual last consumed an alcoholic beverage, when they last consumed food. Based upon the answers to the minimum of those two questions, that may tell me what I need to know or it may lead me to further questions, and I wouldn't know what those questions are until I hear the first answers.

Q. You'd want to know the amount of alcohol, right?

A. Potentially. That would depend upon, again, when that last drink was.

Q. And these are common questions for police to ask a person, when they ask them if they've been drinking, how much, over what period of time; is that correct?

A. Generally so.

Q. And those are questions, the answers to which can be very helpful to you in trying to extrapolate or estimate what the score was at a previous time; is that right?

A. If I'm going to do some mathematics, then

yes. I have to know that information.

Q. Now, if the only information you have is that a person prior to 2:02 a.m. had three beers, but you don't know the size of the beers, you don't know when the first one was, you don't know when the last one was. Can you say that that person was over .08 at 2:02 a.m.?

A. I would conclude that there's not enough information for me to make any conclusion with based on that.

Q. So basically that person could be blowing .08 at the time of driving, right?

A. I would say it would be one of three things. It would be either below .08, they are .08, or they're above .08. I don't know which of the three.

Q. You don't know which of the three, right?

A. Sure.

MR. MEDLIN: Pass the witness, Judge.

(Redirect examination not transcribed)

RECROSS-EXAMINATION

BY MR. MEDLIN:

Q. You get two different results on two different breath samples usually, right?

A. Generally so.

Q. You don't expect those two samples to be exactly the same, do you?

A. No. We're not looking for that. We want them to be representative, in the same ball park.

Q. And we're going to time it three minutes between the two tests?

A. Yes.

Q. Give or take some portion of the minutes since the time only goes to a full minute, not portions thereof, right?

A. Correct.

Q. So really between 2:47 and 2:50 is there any significant change in the alcohol concentration?

A. No, as reflected on the test record and as is reflected in the biochemistry of the body, they're the same.

Q. But you get different results because of the breathing patterns, right?

A. Well, you get different results because, one, the quality of the breath sample. We're looking at two different samples. Just like when I measure the same reference sample on different days, we get different values. If we're going to measure this individual twice, we're going to get slightly different values.

Q. So it doesn't surprise you that there's different values?

A. No.

Q. And you could have the exact same concentration in a person and get a different value with the next test, right?

A. Sure.

Q. Because you said the quality of the breath sample, right?

A. The quality of the breath sample and just natural differences in biological sampling.

Q. Okay.

MR. MEDLIN: Pass the witness.

(End of excerpt, 4:25 p.m.)

STATE OF TEXAS

COUNTY OF TARRANT

I, Jana Kay Bravo, Deputy Official Court Reporter in and for the County Criminal Court No. [illegible] [illegible] other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Signed this ____ day of _______, 20[illegible].

Jana Kay Bravo
Texas CSR #[illegible]
Deputy Official Court Reporter
County Criminal Court No. [illegible]
Tarrant County, Texas
401 W. Belknap
Fort Worth, Texas 76196-[illegible]
Expiration: [illegible]