

IN THE MUNICIPAL COURT
FOR THE CITY OF WICHITA

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CITY OF WICHITA,)	
)	
Plaintiff,)	CASE No.
)	DOCKET No.
vs.)	
)	
_____ ,)	
)	
Defendant.)	
_____)	

P A R T I A L T R I A L T R A N S C R I P T

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This matter came on for hearing before the
Honorable Bryce Abbott, Municipal Court Judge, sitting
in Wichita, Kansas, the 28th day of June, 2004.

A P P E A R A N C E S

The City of Wichita appeared through its
attorney, Mr. Ted Griffith, Assistant City Attorney,
455 North Main, 13th Floor, Wichita, Kansas 67202.

The Defendant appeared in person and through
his attorney, Mr. Mark T. Schoenhofer of Schoenhofer &
Scott, Attorneys at Law, 125 North Market, Suite 1420,
Wichita, Kansas 67202.

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2 Q. You would agree with me that that intersection,
3 though, of Wichita was dark just like the rest
4 of Wichita?
5 A. Oh yes.
6 Q. You will agree with me also that Rockhill Road
7 in the area of Brittany Center is a pretty dark
8 area?
9 A. Yes.
10 Q. In fact, Rockhill Road doesn't have a single
11 street lamp on it, does it?
12 A. I don't recall.
13 Q. I thought you said you're familiar with that
14 area.
15 A. Well, I do, but I am still not sure if it does
16 or not.
17 Q. If I handed you a photograph of Rockhill Road
18 and Woodlawn looking westbound, could you
19 identify it?
20 A. Yes.
21 Q. Let me hand you what I have had marked as
22 Defendant's Exhibit A. Can you tell me what
23 that is?
24 A. That is the intersection that we're talking
25 about.

1 Q. And you will agree with me that Rockhill Road
2 looking westbound is controlled by a traffic
3 light?

4 A. Correct.

5 Q. And that appears in the photograph there?

6 A. Correct.

7 Q. Do you see any lamps or at least in this small
8 portion of Rockhill Road any street lamps?

9 A. No.

10 Q. Okay, if you will just keep that here for a
11 second. I am now going to hand you Exhibit B,
12 but before I do so, Officer, if you were
13 looking eastbound at Rockhill Road and
14 Woodlawn, could you identify Rockhill Road?

15 A. Yes.

16 Q. I'm going to hand you what is marked as
17 Defendant's Exhibit B. Can you tell me what
18 that is?

19 A. It's basically the other direction of the same
20 intersection.

21 Q. Do you see a single street lamp on Rockhill
22 Road?

23 A. No.

24 Q. If you will just leave that there, sir. Now, I
25 think your testimony was that your first you

1 first observed _____ or his vehicle when
2 he was at Rockhill Road and Woodlawn facing
3 Westbound against the south curb on Rockhill
4 Road; is that correct?
5 **A.** Correct.
6 **Q.** Okay. He was stopped at a red light; is that
7 right?
8 **A.** Correct.
9 **Q.** And if I understand correctly, he was preparing
10 to turn left or to go south on Woodlawn; is
11 that right?
12 **A.** Correct.
13 **Q.** And you drove by; is that right?
14 **A.** Correct.
15 **Q.** Now, looking back at Exhibit A, the photograph
16 taken of the intersection facing west, that
17 photo clearly shows the surface of Rockhill
18 Road, doesn't it?
19 **A.** Yes.
20 **Q.** Would you agree with me that the pavement is
21 asphalt?
22 **A.** Correct.
23 **Q.** And would you agree with me that asphalt is
24 typically a darker-color, black or gray?
25 **A.** Correct.

- 1 Q. And it appears so there, doesn't it?
- 2 A. Yes.
- 3 Q. Now, would agree with me that at night a black
4 surface would show a white or yellow centerline
5 or dividing line pretty clearly?
- 6 A. Yes.
- 7 Q. You would agree with me that there are no
8 centerlines on Rockhill Road there, correct?
- 9 A. Correct.
- 10 Q. There are no dividing lines that would show
11 where eastbound traffic or westbound traffic
12 would be, correct?
- 13 A. Correct.
- 14 Q. All right. Now, you will agree with me that on
15 May 12th of 2004, that there were probably no
16 centerlines on that street, too?
- 17 A. Correct.
- 18 Q. All right. Now, you would agree with me also
19 in looking at Exhibit A and Exhibit B that you
20 also don't see any signs that would indicate
21 whether it's a one-way or two-way traffic on
22 that street?
- 23 A. Correct.
- 24 Q. Okay. Does your beat take you to Rock Road?
- 25 A. No.

1 Q. Are you familiar with Rockhill Road at Rock
2 Road?
3 A. No.
4 Q. Have you ever been to the Bradley Fair Shopping
5 Center?
6 A. Yes.
7 Q. Have you ever exited the Bradley Fair Shopping
8 Center on Rockhill Road?
9 A. Yes.
10 Q. Let me show you what is marked as Defendant's
11 Exhibit C. Are you familiar with this
12 intersection of Rockhill Road and Rock Road?
13 And maybe to help you, Officer, this would be
14 the Red Rock Canyon Grill on this side, that
15 would be the mexican restaurant or whatever
16 it's called on the right side. Have you ever
17 exited that way before?
18. A. Yes.
19 Q. Can you identify that as Rockhill Road at Rock
20 Road?
21 A. Technically, that is Bradley Fair.
22 Q. You're absolutely right, it is Bradley Fair for
23 traffic that is on -
24 A. East side.
25 Q. -- the east side, but on the west side,

1 Officer, what does it turn into?

2 **A.** Rockhill.

3 **Q.** Rockhill Road. Same road, but for the sake of

4 Bradley Fair they renamed the street to Bradley

5 Fair, right?

6 **A.** More than likely, yes.

7 **Q.** Okay. You would agree with me in Exhibit C

8 there there's a center island that separates

9 traffic going west on Rockhill Road or Bradley

10 Fair from the eastbound?

11 **A.** Correct.

12 **Q.** And you would agree with me that as the picture

13 delineates on the right side of that picture

14 for traffic that's westbound, that for traffic

15 leaving Bradley Fair there's two lanes there?

16 **A.** Yes.

17 **Q.** And it's all for westbound traffic, correct?

18 **A.** Correct.

19 **Q.** Eastbound traffic does doesn't come in on that

20 side, correct?

21 **A.** Correct.

22 **Q.** It comes in on the other side?

23 **A.** Correct.

24 **Q.** All right. You will also agree with me that

25 the pavement on the Bradley Fair Shopping

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1 Center, that that's asphalt as well?

2 **A.** Yes.

3 **Q.** Not marked by any white or yellow lines to
4 delineate center, correct?

5 **A.** Correct.

6 **Q.** And you would agree with me that there's no
7 signs there that say one-way or two-way traffic
8 on that either, correct?

9 **A.** Correct.

10 **Q.** And then anybody leaving heading westbound out
11 of Bradley Fair on this would turn right or
12 left to get on Rock Road, correct?

13 **A.** What are you asking?

14 **Q.** Asking if somebody is leaving Bradley Fair
15 Shopping Center on Bradley Fair Road or Bradley
16 Fair Street wanted to get on Rock Road at this
17 traffic light, they would either turn right or
18 left depending on whether they wanted to go
19 north or south, correct?

20 **A.** Correct.

21 **Q.** Very well. You would agree with me that like
22 the intersection that you saw _____ at -
23 here shown in Exhibit A -- Exhibit C has a lot
24 of similarities, such as controlled by traffic
25 light, for instance?

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1 **A.** They are.

2 Q. Asphalt paving?
3 A. Correct.
4 Q. Neither the pavement for westbound traffic on
5 Rockhill Road in Exhibit C nor A have any
6 centerlines or dividing lines, correct?
7 A. Correct.
8 Q. No signs that would delineate whether it was
9 one-way or two-way traffic there, correct?
10 A. Correct.
11 Q. And that traffic leaving can either go north or
12 south there, correct?
13 A. Correct.
14 Q. And you would agree that in Exhibit A, Rockhill
15 Road at Woodlawn, that feeds traffic leaving
16 Brittany Center to Woodlawn?
17 A. Correct.
18 Q. And Exhibit C, that feeds traffic leaving
19 Bradley Fair Shopping Center to Rock Road,
20 correct?
21 A. Correct.
22 Q. So there are similarities; would you agree with
23 me?
24 A. You're correct.
25 Q. All right. Now, you stated that when you first

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1 saw _____ vehicle that he was against
2 the south curb of Rockhill Road facing west,

3 correct?

4 **A.** Correct.

5 **Q.** Preparing to turn, correct?

6 **A.** Yes.

7 **Q.** And you saw that his light was red or at least
8 you had a green light because you were on
9 Woodlawn, right?

10 **A.** When I went southbound, it was red. My light
11 was green, his was red.

12 **Q.** His was red and you could see both, correct?

13 **A.** Correct.

14 **Q.** You knew that because he was sitting there
15 against the south curb, which would be a lane
16 reserved for oncoming traffic going eastbound,
17 that he probably wasn't ever going to get a
18 green light?

19 **A.** Probably a good chance of that, yeah.

20 **Q.** Now, when you saw that, Officer, you would
21 agree with me that you had probable cause to
22 approach him, ask him what was going on and
23 maybe even cite him for being in the wrong
24 lane, correct?

25 **A.** Correct.

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1 **Q.** But you didn't do that, correct?

2 **A.** Correct.

3 **Q.** You would agree with me also that there was at

4 that point nothing that you really understood
5 about why he was in that lane except that he
6 was in that lane; would you agree with me?

7 **A.** Yes.

8 **Q.** Could have been a medical condition, stroke or
9 heart attack that caused him to veer over and
10 be there, correct?

11 **A.** Correct.

12 **Q.** You would also agree with me that it could have
13 been too that he was confused and unfamiliar
14 with that street?

15 **A.** Possible.

16 **Q.** And it was also possible that he was being
17 deviant and just wanting to drive against
18 traffic -

19 **A.** (Witness motioned head affirmatively.)

20 **Q.** -- and could be that he was drunk, right?

21 **A.** Yes.

22 **Q.** Could have been a lot of things, but you at
23 that point didn't approach him and investigate
24 to find out what was going on, correct?

25 **A.** Correct.

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1 **Q.** Instead, you went down two blocks to 17th
2 Street and turned your car around and watched
3 from that intersection to see what was going on
4 correct?

5 **A.** Yes.

6 **Q.** So if it was a medical condition, you would
7 have been sitting at 17th Street waiting for
8 sometime for anything to happen, correct?

9 **A.** Yes.

10 **Q.** If it was just a simple traffic infraction, you
11 would perhaps find out later if he ran a red
12 light because he was never going to get a green
13 light, right?

14 **A.** Chances are, yes.

15 **Q.** Or if he had backed up and got in the correct
16 lane and left, you may or may not have stopped
17 him later, correct?

18 **A.** Yes.

19 **Q.** You would agree with me that as a police
20 officer your duty-bound to enforce the laws of
21 the city and state?

22 **A.** Yes.

23 **Q.** And he was perhaps violating a law when he was
24 sitting against the traffic at that point,
25 correct, at Woodlawn and Rockhill Road?

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1 **A.** In that direction, yes.

2 **Q.** And something that you could have investigated
3 and could have stopped at that point, correct?

4 **A.** Yes.

5 **Q.** You will agree with me that if you had had

6 probable cause of DUI at that point, you
7 certainly would have gone up and investigated
8 at that point, right?

9 **A.** Yes.

10 **Q.** But you didn't know whether _____ had
11 even had a drink at that point, correct?

12 **A.** Correct.

13 **Q.** And you certainly didn't have probable cause
14 that he was driving under the influence by just
15 sitting against the eastbound traffic lane,
16 right?

17 **A.** Right.

18 **Q.** Because you would not have let him drive from
19 Rockhill Road even to 17th where you were if
20 you did think he was drunk, right?

21 **A.** I had no contact with him at that time.

22 **Q.** But you would agree with me, though, that you
23 wouldn't let somebody drive a vehicle if you
24 thought they were under the influence to the
25 degree that it would render them incapable of

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1 safely operating a vehicle?

2 **A.** Correct.

3 **Q.** Okay. So despite the fact that there might
4 have been just cause or probable cause to check

5 the welfare and even probable cause of a
6 traffic violation, you preferred to wait for
7 him at 17th Street; is that right?

8 **A.** Yes.

9 **Q.** Okay, that's fine. Now, you didn't know where
10 _____ was coming from at that point,
11 correct?

12 **A.** No.

13 **Q.** You had not been following him, right?

14 **A.** No.

15 **Q.** And you didn't know whether he had had anything
16 to drink that night?

17 **A.** No.

18 **Q.** All right. Now, you stated that you stopped
19 him because you -- well, first of all, let me
20 ask you. I'm handing you what I've marked as
21 Defendant's Exhibit D. Can you tell me what
22 that is?

23 **A.** The intersection of 17th and Woodlawn.

24 **Q.** 17th and Woodlawn where you were watching _____
25 _____ when he went through the late; is that

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1 right?

2 **A.** Yes.

3 **Q.** You would agree with me that's more than 100
4 yards?

5 **A.** Yes.

6 Q. It's probably two blocks, isn't it?
7 A. That would be at least a block.
8 Q. Well, isn't Rockhill Road also 19th Street?
9 A. That, I don't know.
10 Q. Well, if it was it would be two blocks away,
11 right?
12 A. Okay.
13 Q. Am I right?
14 A. Yes.
15 Q. But this is where you observed _____
16 leave from where the stop light appears back
17 here; is that right?
18 A. Yes.

19 MR. SCHOENHOFER: At this point, Your
20 Honor, if I can, I would move for the admission
21 of Exhibits A through D, all identified by
22 City's witness.

23 MR. GRIFFITH: No objection, Judge.

24 THE COURT: A through D are admitted.

25 Q. (By Mr. Schoenhofer) All right, Officer

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1 Ohmart, you sat at 17th and Woodlawn and
2 watched _____ sit there for a while; is
3 that right?
4 A. Yes.
5 Q. Approximately how many minutes had passed from
6 the time you first saw _____ to the time
7 that he finally through the red light?

8 **A.** Maybe two. Maybe. Just long enough to drive
9 to 17th Street and to turn around and sit at
10 the intersection.
11 **Q.** Well, how long did it take you to get from
12 Woodlawn and Rockhill Road to 17th Street, turn
13 your car around and sit there?
14 **A.** I would say under two minutes.
15 **Q.** Under two minutes, okay. And then when you
16 were sitting there, Officer, how long did you
17 watch_____?
18 **A.** Not very long.
19 **Q.** Do you think total you can account for three
20 minutes?
21 **A.** Possible.
22 **Q.** In any event, you watched him, you say, drive
23 through the red light turning southbound onto
24 Woodlawn; is that right?
25 **A.** Correct.

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1 **Q.** You didn't detect any difficulty with him
2 having to negotiate that turn, correct?
3 **A.** No.
4 **Q.** And which lane did he drive in coming your way?
5 **A.** The middle.
6 **Q.** Middle lane meaning the lane nearest the
7 centerline?

8 **A.** Left lane.

9 **Q.** And is that a four-lane road?

10 **A.** Yes.

11 **Q.** Two for northbound and two for southbound?

12 **A.** Correct.

13 **Q.** And he was in the center lane or the one
14 nearest the centerline; is that correct?

15 **A.** Correct.

16 **Q.** And he you didn't observe him having any
17 difficulty staying within the lane, correct?

18 **A.** No.

19 **Q.** When you watched him, Officer, you didn't
20 detect or note any other traffic violations,
21 correct?

22 **A.** Correct.

23 **Q.** Had his headlights on?

24 **A.** Yes.

25 **Q.** Was wearing his seat belt?

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1 **A.** I don't recall.

2 **Q.** And he maintained his lane without any weaving
3 or any problems keeping his car driving
4 straight, correct?

5 **A.** Yes.

6 **Q.** And then once you activated your overhead
7 lights and pulled him over, he didn't have any

8 difficulty pulling over, correct?

9 **A.** Correct.

10 **Q.** And he used his turn signal?

11 **A.** I don't recall.

12 **Q.** He wasn't speeding, correct?

13 **A.** Correct.

14 **Q.** What is the speed zone there?

15 **A.** I believe it's 40.

16 **Q.** And do you know what his speed was when he

17 passed you?

18 **A.** No.

19 **Q.** Was it close to 40?

20 **A.** I don't know.

21 **Q.** Was it 5 miles per hour?

22 **A.** No.

23 **Q.** Was he driving closer to 40 than 5?

24 **A.** Yes.

25 **Q.** And when he has passed, Officer, you stated

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1 that you were only a car's length away from him

2 when you pulled in behind him?

3 **A.** No.

4 **Q.** Must have gunned it really hard, then?

5 **A.** No.

6 **Q.** How did you get from zero to, say, 30 or 35

7 miles per hour --

8 **A.** As I --

9 **Q.** Let me finish my question, sir -- to be able to
10 be only one car length away when he was passing
11 you at 30 to 35 miles an hour?

12 **A.** I did.

13 **Q.** In any event, he pulled over in the 1500 block
14 of north Woodlawn, correct?

15 **A.** Correct.

16 **Q.** Now, I trust that you were pulling him over for
17 two traffic violations that you had observed?

18 **A.** Correct.

19 **Q.** Him being in an oncoming lane of traffic that
20 he shouldn't have been in?

21 **A.** Correct.

22 **Q.** Left of center maybe or something like that?

23 **A.** Double drive, right side, two lanes.

24 **Q.** And the other was that he drove through a red
25 light?

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22

1 **A.** Correct.

2 **Q.** Sometimes referred to as run red light?

3 **A.** Correct.

4 **Q.** And at least here, though, kind of a stretch;
5 would you agree?

6 **A.** No.

7 **Q.** He was stopped at the red light, wasn't he?

8 **A.** Yes.

9 **Q.** Waiting for the light to turn green?

10 **A.** Yes.

11 **Q.** And never tripped the signal; is that correct?

12 **A.** Correct.

13 **Q.** And so the light never turned green for him?

14 **A.** Correct.

15 **Q.** Theoretically, _____ could have been

16 sitting there until morning before it turned

17 green, correct.

18 **A.** Possible.

19 **Q.** And yet when he chose to through it because it

20 wouldn't turn green, that's what you are citing

21 him for, correct?

22 **A.** Correct.

23 **Q.** Now, would you agree with me that there are

24 times when traffic signals in Wichita break,

25 they malfunction?

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1 **A.** Yes.

2 **Q.** One side will never turn green, the other side
3 stays red or something of that nature?

4 **A.** Okay.

5 **Q.** Would you agree with me there's problems with
6 some lights here in Wichita?

7 **A.** Some, yes.

8 **Q.** Would you agree with me that sometimes there's
9 a need for police to intervene and direct
10 traffic when a light malfunctions?

11 **A.** Yes.

12 **Q.** You would agree with me that there are times
13 that even private citizens will go out and
14 direct traffic when there's a need because
15 lights are malfunctioning?

16 **A.** Yes.

17 **Q.** And you would agree with me there's nothing
18 illegal or improper about either a private
19 citizen or a law enforcement officer directing
20 traffic where a light is malfunctioning?

21 **A.** No.

22 **Q.** And you would agree with me that _____ was
23 sitting at a light that wasn't turning green
24 for him and you even knew that when you went
25 down to 17th Street?

1 A. Yes.

2 Q. You would agree with me that he didn't have the
3 advantage of anybody going out and directing
4 traffic for him and allowing him to drive
5 through that red light so that he could get
6 onto Woodlawn, correct?

7 A. That's correct.

8 Q. Or the advantage of a police officer going up
9 to him and telling him, hey, you will never
10 trip the signal here, you're on the back side
11 of the road, back your car up and get on the
12 ride side?

13 A. That's correct.

14 Q. Instead, what you did is you went to 17th and
15 waited for him to break another law -

16 A. Correct.

17 Q. -- so that you could pull him over and cite
18 him; is that correct?

19 A. Yes.

20 Q. Okay. So you stopped _____ in the 1500
21 block of north Woodlawn, correct?

22 A. Correct.

23 Q. I'm going to hand you what's I've marked as
24 Defendant's Exhibit F. Can you identify that
25 for me, please?

1 **A.** That would be approximately the 1500 block of
2 north Woodlawn and Abbotsford Street.

3 **Q.** You will agree with me that that's facing
4 westbound, the person taking that photograph?

5 **A.** Yes.

6 **Q.** And you would agree with me the street sign in
7 the left-hand corner shows the 1500 north
8 block?

9 **A.** Correct.

10 **Q.** And it shows at least part of the word
11 Woodlawn?

12 **A.** Correct.

13 **Q.** And above that is the sign showing Abbotsford
14 Street; is that correct?

15 **A.** Correct.

16 **Q.** And as your testimony indicated earlier, where
17 you were sitting at the 1700 block separated
18 1700 from the 1800 north block of Woodlawn,
19 correct?

20 **A.** Correct.

21 **Q.** And then Abbotsford would separate 1500 block
22 and 1600 block of north Woodlawn, correct?

23 **A.** Correct, on the -- on the east side of the
24 street.

25 **Q.** The picture is been being taken from the east

1 side; is that right?

2 **A.** Correct.

3 **Q.** Looking westbound, correct?

4 **A.** Yes.

5 **Q.** And you would agree with me there is a sidewalk
6 that is west of the curb there?

7 **A.** Yes.

8 **Q.** And you would agree with me that that is the
9 sidewalk, in fact, that you conducted the field
10 sobriety testing on?

11 **A.** No, I would not.

12 **Q.** Why would you not agree with that?

13 **A.** Because that is actually the 1600 block north
14 on the west side of the street.

15 **Q.** And you have some type of indication here today
16 with you to indicate to the Court that across
17 the street here is 1600 north?

18 **A.** Not that I have with me, no.

19 **Q.** And do you understand why it would be different
20 for the east and west side of Woodlawn?

21 **A.** That's the way the city is set up.

22 **Q.** So when you were driving down -- excuse me --
23 when you got in behind _____ and pulled
24 him over, are you saying you pulled him over
25 one block to the north of this place right

1 here?

2 **A.** To the south.

3 **Q.** To the south?

4 **A.** Correct.

5 **Q.** So this across the street is what?

6 **A.** 16.

7 **Q.** 1600 north?

8 **A.** Uh-huh. (Witness motioned head affirmatively.)

9 **Q.** And you're saying it was closer to 13th Street,

10 then?

11 **A.** Yes.

12 **Q.** So if his testimony is different than yours and

13 that he was actually right where you pointed or

14 in that picture, that would be inaccurate,

15 then; is that right?

16 **A.** Correct.

17 **Q.** I'm going to show you what has been marked as

18 Exhibit G. Can you identify what that is?

19 **A.** That is also the 1600 block of north Woodlawn.

20 **Q.** Looking -

21 **A.** Southbound.

22 **Q.** -- southbound for what shows there the better

23 of a couple of blocks; would you agree?

24 **A.** Shows about a block. Because this little pole

25 right here is the next block, it's a street

1 light.

2 Q. And you can see actually right here to the left
3 where that block is that you're talking about,
4 correct?

5 A. These blocks are not equal, they're offset,
6 they don't go straight across.

7 Q. Is it your testimony that it was at 13th Street
8 that you conducted this test?

9 A. No, it's not.

10 Q. So your testimony is that it was one block to
11 the south; is that correct?

12 A. Correct.

13 Q. And you're telling the Court that the street
14 sign that is off to the left there of Exhibit G
15 is not the indicator of that next block?

16 A. Okay, you're talking about -

17 Q. Just answer the question for me, sir. Are you
18 telling the Court that that street sign that is
19 off the left of this exhibit is not the
20 indication of the next block?

21 A. Correct.

22 Q. I'm going to hand you what has been marked as
23 Exhibit H. Can you identify what that is?

24 A. That is Abbotsford and Woodlawn Street sign.

25 Q. Looking what direction?

1 A. South.

2 Q. Can you see the block that you are talking
3 about the right-hand corner of Exhibit H that
4 you conducted field sobriety in?

5 A. Yes, it is right here.

6 Q. Where the row of trees is?

7 A. South of the row of trees.

8 Q. Officer, the way I'm looking at it it looks
9 like there is a row of trees probably all the
10 way down to Central. Would you agree?

11 A. I'm sure there is, yes.

12 Q. Okay, thank you. Is it your testimony that you
13 took a record of what the wind was like that
14 day?

15 A. Did I take a record? No.

16 Q. Take a record of what the weather was like?

17 A. No adverse conditions.

18 Q. Did you indicate anywhere in any aspect of your
19 report or in any of the forms that you filled
20 out relating to this investigation what the
21 weather was like that day?

22 A. No.

23 Q. Done any research since this arrest or
24 investigation to know exactly what the weather
25 was like that day?

1 **A.** No.

2 **Q.** Would you have any reason to dispute the NOAA
3 Climatic Data Center records, which is a
4 national record-keeping agency?

5 **A.** No.

6 **Q.** Would you have any objection or any reason to
7 dispute if on the 12th of May it indicated that
8 winds were gusting up to 25 miles per hour?

9 **A.** No.

10 **Q.** And that would have been for the 12th. Or do
11 you have any reason to dispute that it was 35
12 miles an hour in gusts that the day before?

13 **A.** No.

14 **MR. SCHOENHOFER:** Your Honor, the
15 Court can take judicial notice of the records
16 of a federal agency. I've marked the NOAA
17 report from May 2003 as my exhibit and I would
18 ask the Court to take judicial notice of what
19 the weather was like that day. Everybody has
20 had a copy of it attached to my motion.

21 **MR. GRIFFITH:** Judge, I don't object
22 to it as it's offered. I would like the Court
23 to note that these records were based on
24 measurements taken at Mid-Continent Airport on
25 that day.

1 THE COURT: I will accept the Exhibit

2 I.

3 MR. SCHOENHOFER: Thank you, Your

4 Honor.

5 Q. (By Mr. Schoenhofer) Officer, you stated that

6 you went through some training in standardized

7 field sobriety tests?

8 A. Yes.

9 Q. And in your training and administering these

10 tests you understand that wind can interfere

11 with the results of the tests?

12 A. Yes.

13 Q. You understand, as everybody does in life, that

14 a strong gust of wind can blow a person off

15 balance?

16 A. Yes.

17 Q. In any event, you stated that you approached

18 _____ window and requested his license

19 and proof of insurance; is that right?

20 A. Yes.

21 Q. And he was able to give you those?

22 A. His license.

23 Q. You learned that _____ was, in fact, the

24 driver of the vehicle; is that right?

25 A. Correct.

- 1 Q. What kind of vehicle was that?
- 2 A. It's an Infiniti.
- 3 Q. And Q455 I think is what you marked down?
- 4 A. Sounds about right.
- 5 Q. I'm handing you what's been marked as
6 Defendant's Exhibit E. Would that look like
7 the vehicle he was driving that evening?
- 8 A. Yes.
- 9 Q. Incidentally, I was able to pull that off the
10 Internet, Officer, that's a 2003 Q45 Infiniti,
11 but you're stating it looked like that; is that
12 right?
- 13 A. Similar, yes.
- 14 Q. How tall are you, sir?
- 15 A. Six-two.
- 16 Q. And you stood quite a ways above the roof of
17 that car?
- 18 A. Yes.
- 19 Q. I'm sorry?
- 20 A. Yes.
- 21 Q. And as I understand it, when you approached you
22 stood at the rear of the driver's door; is that
23 right?
- 24 A. Correct.
- 25 Q. You stated that you had never spoken with ____

- 1 _____ prior to that evening, correct?
- 2 **A.** Correct.
- 3 **Q.** Didn't know him?
- 4 **A.** Correct.
- 5 **Q.** Had even heard him speak; is that right?
- 6 **A.** Correct.
- 7 **Q.** Had never even seen him before as far as you
- 8 know; is that right?
- 9 **A.** Correct.
- 10 **Q.** And you don't know whether _____ was
- 11 speaking any differently that morning that he
- 12 had typically been speaking for years before
- 13 that, right?
- 14 **A.** No.
- 15 **Q.** Now, you stated that _____ was able to
- 16 produce his driver's license, right?
- 17 **A.** Yes.
- 18 **Q.** What kind of wallet did _____ have?
- 19 **A.** It was a black wallet/card-holder style.
- 20 **Q.** And you say card-holder such as a card-holder
- 21 that someone would put business cards in?
- 22 **A.** Yes.
- 23 **Q.** How cram-packed full of cards was it, do you
- 24 know?
- 25 **A.** I don't recall.

1 Q. Do you recall whether it was relatively empty?

2 A. I don't.

3 Q. Do you recall whether there were a lot of
4 credit cards in it?

5 A. No.

6 Q. You don't know whether there was a lot of other
7 items in it other than his driver's license,
8 then?

9 A. I think I answered that.

10 Q. So what is your answer?

11 MR. GRIFFITH: Objection, Judge, asked
12 and answered.

13 MR. SCHOENHOFER: Well, that would be
14 the objection.

15 THE COURT: Overruled.

16 A. I don't recall.

17 Q. (By Mr. Schoenhofer) You will agree that in
18 your training, Officer, in the detection of
19 signs of intoxication you look for certain
20 motor skills problems, right?

21 A. Right.

22 Q. And one of boiler plate remarks that I see all
23 the time in an officer's report for DUI is that
24 they fumbled for their driver's license. Is
25 that something that an officer is trained to

1 look for?

2 **A.** Yes.

3 **Q.** Has there ever been a time that you haven't put
4 in one of your DUI reports that the suspect
5 fumbled for his driver's license?

6 **A.** Yes.

7 **Q.** But here you stated that he fumbled for it.
8 What do you mean he fumbled for it, sir?

9 **A.** Had a hard time getting it in and out of -- or
10 out of the license wallet-holder.

11 **Q.** So he had a hard time removing the driver's
12 license from the wallet; is that correct?

13 **A.** Correct.

14 **Q.** You will agree with me that if a driver's
15 license is struck behind several credit cards
16 and scrunched in a small space within the
17 wallet, someone might have to take a couple of
18 jabs at it to get it removed?

19 **A.** Possible.

20 **Q.** What kind of wallet do you have, sir?

21 **A.** I have a card-holder style.

22 **Q.** Have you ever stuck it between other cards and
23 had difficulty in removing it, your license?

24 **A.** Yes.

25 MR. GRIFFITH: Objection, Judge,

1 relevance.

2 THE COURT: Overruled.

3 Q. Would you call that the fumbling for your
4 driver's license when you had a hard time
5 removing it?

6 A. No.

7 Q. Why?

8 A. Because there's a difference between my
9 interpretation of fumbling and what you are
10 describing.

11 Q. So when you testified earlier he had difficulty
12 removing his driver's license from the wallet
13 and you had difficulty removing your driver's
14 license from your wallet, his is fumbling,
15 yours is not; is that right?

16 A. Well -- yes.

17 Q. Have you ever seen an individual fumble for his
18 driver's license when he wasn't intoxicated?

19 A. Yes.

20 Q. In reality, taking a driver's license and
21 having difficulty in removing it from a wallet
22 may have absolutely nothing to do with
23 intoxication, correct?

24 A. Possible.

25 Q. Or his ability to safely drive a vehicle on the

- 1 road, correct?
- 2 **A.** Correct.
- 3 **Q.** You would agree that he was safely driving his
4 vehicle from Woodlawn, once he was on Woodlawn,
5 to the time that you stopped him?
- 6 **A.** Yes.
- 7 **Q.** You would agree that when he turned the corner
8 from Rockhill Road, going through the light and
9 getting onto Woodlawn, that he endangered
10 neither himself nor anyone one else?
- 11 **A.** Correct.
- 12 **Q.** You state that _____ introduced himself as
13 _____ of _____ Motors; is that correct?
- 14 **A.** Correct.
- 15 **Q.** Did that without any initiation from you as to
16 who he was?
- 17 **A.** Yes, I asked -- at that point I asked him for
18 his driver's license and insurance.
- 19 **Q.** And you were standing behind him, correct?
- 20 **A.** Standing along side the car, yes.
- 21 **Q.** Behind him, though, over his left shoulder and
22 behind the driver's window, correct?
- 23 **A.** Correct.
- 24 **Q.** And his window was down?
- 25 **A.** Yes.

- 1 Q. You were standing above the roof?
- 2 A. Yes.
- 3 Q. NOAA says the wind was blowing; is that right?
- 4 A. That's what you informed me of, yes.
- 5 Q. _____ stated that -- what was the first
6 thing that he said to you, what was the first
7 thing that he said?
- 8 A. First thing is probably he identified himself.
- 9 Q. Your report says that the first thing he said
10 to you was, "Do you know who I am?" Would that
11 be accurate?
- 12 A. Without looking at the report, I don't know.
- 13 Q. That small utterance, based upon that single
14 utterance, Officer, your report also says that
15 you smelled the strong odor of alcohol; is that
16 correct?
- 17 A. Yes.
- 18 Q. While you were standing above the roof,
19 correct?
- 20 A. Yes.
- 21 Q. You weren't down by the window, correct?
- 22 A. I'm not leaning in the car by any means, no.
- 23 Q. Certainly. You had your flashlight with you?
- 24 A. Yes.
- 25 Q. Because it was dark out, right?

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- 1 A. Yes.

2 Q. You were looking down at him or standing up
3 behind him?

4 A. Standing up close looking at him.

5 Q. Standing behind him, looking at him and that
6 was when you smelled the odor of alcohol,
7 right?

8 A. Yes.

9 Q. Okay. In any event, you asked him where he had
10 been; is that right?

11 A. Correct.

12 Q. Told you Fingers?

13 A. That's correct.

14 Q. You asked him if he had had anything to drink,
15 correct?

16 A. Yes.

17 Q. Said he had had a few right?

18 A. Yes.

19 Q. Did you inquire as to what that meant?

20 A. No.

21 Q. Did you ask him what kind of drinks he had?

22 A. No.

23 Q. Did you ask him over what period of time he had
24 those drinks?

25 A. No.

1 Q. At any point in your investigation from the
2 timed you stopped him until the time you
3 handcuffed him and put him in the back of your
4 car, Officer, did you ask him over what period
5 of time you had these drinks?

6 A. No.

7 Q. Or how much he had had?

8 A. No.

9 Q. Or what type?

10 A. No.

11 Q. Or what he had eaten?

12 A. No.

13 Q. Okay. You asked him out of the vehicle to
14 perform field sobriety tests, correct?

15 A. Yes.

16 Q. Because at that point you had not developed
17 your probable cause to arrest, you only had
18 suspicion he was drunk because you smelled
19 alcohol, correct?

20 A. Correct.

21 Q. So he gets out and you take him to the west
22 side of Woodlawn on the sidewalk, correct?

23 A. Correct.

24 Q. And you are stating it's not as shown on
25 Exhibit G or F, it's a block away to the south;

1 is that right?

2 **A.** Correct.

3 **Q.** You would agree with me, however, there's a row
4 of trees on either side of the sidewalk where
5 you did the test?

6 **A.** No.

7 **Q.** You would agree with me that you certainly
8 could have gone across to the other side of the
9 street, which would have been on the east side
10 as indicated in Exhibit H, where there is
11 absolutely no trees on the sidewalk, correct?

12 **A.** Yes.

13 **Q.** And it would not have been obstructed at all
14 from any light, correct?

15 **A.** Correct.

16 **Q.** If you had been on the east side of Woodlawn,
17 correct?

18 **A.** Correct.

19 **Q.** But, instead, it was on the west side where
20 trees appear on either side of the sidewalk,
21 correct?

22 **A.** Incorrect.

23 **Q.** Did you bring photographs of where you took -

24 **A.** No, I did not.

25 **Q.** And as I understand it, you say that you were a

1 couple paces away, meaning from the curb of
2 Woodlawn to where the sidewalk was was a couple
3 of paces?

4 **A.** Correct.

5 **Q.** Would you have any reason to dispute my
6 investigator's measurements that you saw
7 earlier on the video as being 14 feet and eight
8 inches?

9 **A.** Not at that section of the road, no, I would
10 not.

11 **Q.** Would you agree with me that where the sidewalk
12 was it certainly too far off to the right to
13 have been able to get any light from the
14 headlights of your vehicle?

15 **A.** In your pictures, yes.

16 **Q.** I'm talking about where he was told to be
17 taking his field sobriety test.

18 **A.** No.

19 **Q.** You will agree with me the sidewalk was dark?

20 **A.** Yes.

21 **Q.** You would agree with me that you were not
22 casting any additional light on the sidewalk
23 for him to take the test?

24 **A.** No.

25 **Q.** You say --

1 **A.** Because there is a flashlight. I have a
2 flashlight, Office Little had flashlight, as
3 well as the car lights.

4 **Q.** You say that you had a flashlight?

5 **A.** Yes.

6 **Q.** You told the Court that you were filling out an
7 Alcohol/Drug Influence Report while you were
8 doing the test?

9 **A.** Yes.

10 **Q.** So you were filling that out, holding the forms
11 in one hand and writing with the other hand,
12 correct?

13 **A.** Yes.

14 **Q.** And you had the flashlight in your mouth?

15 **A.** No.

16 **Q.** So you how are you filling out the report,
17 watching the test being taken and flashing a
18 flashlight on the sidewalk?

19 **A.** Because the flashlight goes underneath my left
20 arm, the paperwork and pen are under the light
21 of beam which still allows a lot of light on
22 the sidewalk.

23 **Q.** As I understand your testimony, you had the
24 flashlight under your left arm; is that right?

25 **A.** Yes.

1 Q. And you were writing and also being able to
2 cast the light on the sidewalk?

3 A. Yes.

4 Q. And Office Little, by the way, came after
5 _____ was arrested and in the back seat of the
6 vehicle; is that correct?

7 A. No, that's not correct.

8 Q. Did he produce a report that you know of?

9 A. Not that I know of.

10 Q. Or any type of written notes as to what
11 happened here?

12 A. I would have no idea, you would have to ask
13 him.

14 Q. You would agree with me that the foliage from
15 the trees created an obstruction to having
16 street lights being able to cast light on the
17 sidewalk?

18 A. Again, we are talking about two different
19 locations.

20 Q. We're talking about 1500 north of Woodlawn.

21 A. I am talking about 1500 block of north
22 Woodlawn. You're talking about 1600 on the
23 west side of the street.

24 Q. You would agree with me that the 1500 block of
25 north Woodlawn is, in fact, exactly what you

1 put in your information report?

2 A. Yes, it is. It is.

3 Q. Now, _____ was between his vehicle and
4 your vehicle off to the west, is that right,
5 when doing field sobriety?

6 A. Yes.

7 Q. So the headlights you're talking about that
8 cast a light or some type of illumination on
9 the sidewalk in front of him would have been
10 from the car lights that were behind him,
11 correct?

12 A. Correct.

13 Q. And you would agree with me that his body
14 obviously would have created a shadow even if
15 there was light -

16 A. Correct.

17 Q. -- that was coming from behind?

18 A. Correct.

19 Q. Okay. Field sobriety tests were given in what
20 order?

21 A. Walk-and-turn and then the one-leg stand.

22 Q. So you gave the walk-and-turn first?

23 A. Yes.

24 Q. And you stated that you instructed _____
25 on how to do that properly; is that right?

- 1 **A.** Correct.
- 2 **Q.** And the instructions that you gave are the
3 instructions that you were trained in giving?
- 4 **A.** Correct.
- 5 **Q.** What manual were you trained out of?
- 6 **A.** The standardized manual that the academy holds.
- 7 **Q.** And what year from -- it was '98 that you first
8 took the course?
- 9 **A.** Yes.
- 10 **Q.** What year was the first publication, do you
11 recall?
- 12 **A.** Oh, I do not.
- 13 **Q.** In any event, the first thing you told him to
14 do was the walk-and-turn test. If you could
15 for me, please, before instructing him on that
16 you selected the site for him to take the test;
17 is that right?
- 18 **A.** Yes.
- 19 **Q.** What were you looking for in looking for the
20 appropriate place? And I would like a list of
21 everything.
- 22 **A.** Flat and level surface free of type of debris,
23 which would easily be light accessible from a
24 flashlight or another overhead light.
- 25 **Q.** Is that it?

- 1 **A.** Yeah.
- 2 **Q.** Okay. And you would agree with me that you
3 were -- you had made no measurements and we had
4 already gone over this, you didn't take any
5 record of what the weather was like, correct?
- 6 **A.** Correct.
- 7 **Q.** Now, Officer, you did take _____
8 driver's license, correct?
- 9 **A.** Correct.
- 10 **Q.** Before conducting field sobriety, you noted his
11 height and weight?
- 12 **A.** It was on the driver's license.
- 13 **Q.** Did you take a look at it and note it?
- 14 **A.** No.
- 15 **Q.** You didn't know what his height and weight was
16 before beginning this test?
- 17 **A.** No.
- 18 **Q.** Is weight a factor that you need to consider in
19 giving the test?
- 20 **A.** Yes.
- 21 **Q.** Is weight a factor you need to consider in
22 scoring a test?
- 23 **A.** Yes.
- 24 **Q.** What is it you were trained in understanding
25 regarding weight?

1 **A.** So many pounds over your optimal weight, so
2 many inches per height and weight, that type of
3 thing.
4 **Q.** You don't recall what it was?
5 **A.** Not totally, no.
6 **Q.** Not important?
7 **A.** Not verbatim.
8 **Q.** It's not important, then?
9 **A.** No, I didn't say that.
10 **Q.** Why is it you don't know?
11 **A.** Because I don't know it verbatim out of the
12 book.
13 **Q.** Do you carry the book with you?
14 **A.** No, I do not.
15 **Q.** Did you cite the book before giving the field
16 sobriety?
17 **A.** No, I did not.
18 **Q.** You would agree with me, however, that field
19 sobriety test is standardized?
20 **A.** Yes.
21 **Q.** You had agree with me that if you step out of
22 or deviate from the standard, the reliability
23 of the test is compromised?
24 **A.** Yes.
25 **Q.** You can't trust the results?

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1 **A.** Yes.

2 Q. That's just one element. If you go outside the
3 field sobriety test and deviate even one
4 element, it can compromise the test and throw
5 the results off, correct?

6 A. Correct.

7 Q. So did you note how tall _____ was?

8 A. No.

9 Q. Or whether he was overweight?

10 A. No.

11 Q. Do you know what his age was?

12 A. No.

13 Q. Age is another factor to consider, correct?

14 A. Correct.

15 Q. You would also agree with me that there has to
16 be a designated line for the walk-and-turn?

17 A. Yes.

18 Q. You would agree with me that you said you
19 designated the edge of the sidewalk?

20 A. Correct, as a reference point.

21 Q. As a reference point. Was there a designated
22 line for _____ to walk in?

23 A. No.

24 Q. You would agree with me that instructing on the
25 walk-and-turn, that a designated line has to be

1 there for _____ to take nine steps heel
2 to-toe down that line?

3 **A.** Yes.

4 **Q.** That is what the instructions are, correct?

5 **A.** Yes.

6 **Q.** You would agree with me that if he doesn't have
7 a line, he can't take nine steps down that
8 line?

9 **A.** In optimal conditions he would have a line.

10 **Q.** And you're saying under optimal conditions.
11 It's under every test that he has to have a
12 designated line, correct?

13 **A.** Yes.

14 **Q.** Not just under ideal conditions?

15 **A.** Yes.

16 **Q.** You said you checked to see whether _____
17 had back, leg or middle ear problems before
18 conducting field sobriety, correct?

19 **A.** I asked him if he had any medical conditions
20 which would prevent him from doing what I had
21 just demonstrated to him.

22 **Q.** Isn't it true, sir, that during your cross
23 examination under oath at the matter of the
24 driving privileges of _____ you agreed
25 that what you had asked him was whether he

1 could walk normally?

2 **A.** I don't recall that, but -

3 **Q.** Well, would you dispute that, in fact, that is
4 what you had asked him and what you testified
5 that you asked him at the hearing?

6 **A.** No, I would not.

7 **Q.** So what you had asked him was whether he could
8 walk normally and he said yes, correct?

9 **A.** Correct.

10 **Q.** So you didn't ask him, in fact, is there any
11 medical condition that would prevent you from
12 being able to walk heel-to-toe nine steps with
13 your hands down to your side down a designated
14 line, correct?

15 **A.** Correct.

16 **Q.** Now, the score that you had given _____ on
17 the walk-and-turn was a 4 out of a possible 8,
18 correct?

19 **A.** Correct.

20 **Q.** And you scored him off on losing balance during
21 instructions; is that correct?

22 **A.** Correct.

23 **Q.** First of all, beginning with that one, what
24 told you was that he was a little
25 nervous and he had to kind of loosen up before

1 he took the test; is that correct?

2 **A.** Correct.

3 **Q.** So he stepped out of the instruction phase

4 because he was nervous, correct?

5 **A.** Yes.

6 **Q.** He told you that you and you wrote that down,

7 correct?

8 **A.** Correct.

9 **Q.** He didn't step out of the instructional phase

10 because he lost balance or because he was

11 incapable of doing that, correct?

12 **A.** Correct.

13 **Q.** So the score that you gave him there is

14 something that the Court needs to consider, I

15 think, correct?

16 **A.** Okay.

17 **Q.** Regarding the other one, stops while walking.

18 You stated that he stopped after taking nine

19 steps down, correct?

20 **A.** Correct.

21 **Q.** So because he stopped there, Officer, you

22 scored him off; is that right?

23 **A.** Yes.

24 **Q.** Doesn't touch heel-to-toe on a couple of them;

25 is that correct?

- 1 **A.** Correct.
- 2 **Q.** Is that going down the first nine steps or
3 coming back?
- 4 **A.** Down and back.
- 5 **Q.** Both of them, then, okay. And you don't recall
6 how far of a gap between heel-to-toe there was,
7 correct?
- 8 **A.** No, just that he did not touch heel-to-toe.
- 9 **Q.** And this was something that you observed while
10 taking notes and illuminating light on the
11 subject, correct?
- 12 **A.** Yes.
- 13 **Q.** All right. Did take his nine steps, though,
14 correct?
- 15 **A.** Yes.
- 16 **Q.** You stated there were 18 total steps a person
17 has to take?
- 18 **A.** Correct.
- 19 **Q.** What about those tiny little steps at the end
20 when they're pivoting?
- 21 **A.** I did not include those in the steps.
- 22 **Q.** Okay. You also stated that he made an improper
23 turn; is that correct?
- 24 **A.** Yes.
- 25 **Q.** Went the wrong way?

- 1 A. Correct.
- 2 Q. Which way was he supposed to go?
- 3 A. Supposed to go to the left and he went to the
- 4 right.
- 5 Q. He went to the right, okay. And he was
- 6 watching you do it?
- 7 A. Yes.
- 8 Q. Were you facing him while you were doing it?
- 9 A. No.
- 10 Q. Did you tell him you have to turn to the left?
- 11 A. Yes -- well, no, I did not tell him to turn
- 12 left. When you start and stop, you start on
- 13 the same foot and so it would be -- the right
- 14 turn.
- 15 Q. You would agree with me, again, Officer, that
- 16 _____ told you before doing the one-leg
- 17 stand that he had a condition of his ankles
- 18 called gout?
- 19 A. Correct.
- 20 Q. Mr. Griffith asked you whether _____ was a
- 21 card-carrying gout member, is that right,
- 22 whether he had actually had proof that he had
- 23 gout?
- 24 A. Yes.
- 25 Q. And he didn't show you anything?

- 1 **A.** No.
- 2 **Q.** He didn't have any medical records with him
3 that evening?
- 4 **A.** No.
- 5 **Q.** Did you look at his ankles?
- 6 **A.** No.
- 7 **Q.** Didn't observe to see whether they were
8 swollen?
- 9 **A.** No.
- 10 **Q.** Did he tell you that it was painful?
- 11 **A.** Said they were sore, I believe.
- 12 **Q.** Said they were sore, okay. Nonetheless, you
13 told him to take the test; is that right?
- 14 **A.** Correct.
- 15 **Q.** You didn't tell him that I won't make you do
16 this test since you've got sore ankles?
- 17 **A.** Correct.
- 18 **Q.** And you would agree with me, then, that he did
19 his best at the one-leg stand, gave it his best
20 shop?
- 21 **A.** He attempted the test, yes.
- 22 **Q.** Swayed while balancing?
- 23 **A.** Yes.
- 24 **Q.** On a sore ankle?
- 25 **A.** Yes.

- 1 Q. Used his arms to balance -
- 2 A. Yes.
- 3 Q. -- on a sore ankle?
- 4 A. Yes.
- 5 Q. And he put his foot down; is that right?
- 6 A. Correct.
- 7 Q. Three out of a possible four; is that right?
- 8 A. Correct.
- 9 Q. And you would agree with me that when there is
10 a test given to somebody who has either a
11 medical condition, say, leg, back or inner ear
12 disorder, that that is something that can
13 affect and compromise the reliability of the
14 one-leg stand?
- 15 A. Yes.
- 16 Q. You are taught that, aren't you, when giving
17 the standardized field sobriety test?
- 18 A. Yes.
- 19 Q. You are told the fact that if somebody has a
20 medical condition like that that they may not
21 be able to take the test, correct?
- 22 A. Correct.
- 23 Q. Similarly, you are told if they're over a
24 certain age they may not be able to take the
25 test?

- 1 **A.** Correct.
- 2 **Q.** Or overweight?
- 3 **A.** Correct.
- 4 **Q.** You are also told that there has to be
5 sufficient lighting for somebody taking the
6 one-leg stand test?
- 7 **A.** Correct.
- 8 **Q.** You're also taught that weather conditions such
9 as strong wind can affect a person's ability to
10 take a test?
- 11 **A.** Correct.
- 12 **Q.** You would agree with me that it can even be
13 considered unsafe to make somebody take a test
14 that has a medical condition who is overage,
15 overweight, in dark conditions with wind?
- 16 **A.** Yes.
- 17 **Q.** And does it seem at all surprising to you, sir,
18 knowing that all of these circumstances existed
19 that _____ may have had difficulties
20 balancing without swaying?
- 21 **A.** No.
- 22 **Q.** Or using his arms to balance?
- 23 **A.** No.
- 24 **Q.** Or even putting his foot down?
- 25 **A.** No.

1 Q. In fact, you would agree with me that any of
2 those conditions, any of those factors, age,
3 weight, medical condition, the darkness out
4 there, the lighting and the weather, the wind
5 could have been the factors that caused him to
6 exhibit these clues on the one-leg stand?

7 A. Yes.

8 Q. And you would also agree with me could have
9 been the same thing with _____
10 difficulty losing balance in the walk-and-turn?

11 A. Yes.

12 Q. Stopping while walking?

13 A. Yes.

14 Q. Even touching heel-to-toe?

15 A. Yes.

16 Q. Are you at all familiar with gout?

17 A. No.

18 Q. You stated that refused to take the
19 breath test; is that right?

20 A. Yes.

21 Q. It's also your testimony that was
22 handcuffed in the back of the police car when
23 he was given the DC-70, correct?

24 A. Correct.

25 Q. And you laid that on his lap, correct?

1 **A.** Correct

2 **Q.** _____ told you he had glasses in the
3 briefcase in his car?

4 **A.** Yes - well, he told me he had glasses in his
5 car.

6 **Q.** Asked for you to get those?

7 **A.** No, I don't believe so. I don't recall that,
8 anyway.

9 **Q.** Told you that he couldn't read the DC-70
10 correct?

11 **A.** Correct.

12 **Q.** And you understand that being informed about
13 his rights requires not only that he had read
14 the form, but that he reads along?

15 **A.** MR. GRIFFITH: Objection, Judge,
16 misstates the requirement. The requirement is
17 that he is served a copy and it is read orally.

18 MR. SCHOENHOFER: I have a case law,
19 Your Honor, or we can argue that out if you
20 want at a later date, Your Honor.

21 THE COURT: Not a later date.

22 MR. SCHOENHOFER: Or time, I mean.
23 That's asking him to draw a legal conclusion
24 anyway.

25 THE COURT: Yeah, it is asking him to

1 draw a legal conclusion. I know where the case
2 laws is going.

3 MR. SCHOENHOFER: That's fine.

4 Q. (By Mr. Schoenhofer) You would agree with me,
5 however, that he was unable to read along?

6 A. According to him, yes.

7 Q. You will also understand that Mr. -- well, did
8 _____ tell you that he was on a specific
9 diet at this time?

10 A. No.

11 Q. Did you ask him?

12 A. No.

13 Q. Did you ask him what kind of medication he was
14 taking?

15 A. No.

16 MR. SCHOENHOFER: Very well. Give me
17 just a moment, Your Honor. Your Honor, I have
18 no further questions.

19 THE COURT: Okay, thank you.

20 Redirect

21 MR. GRIFFITH: Yes, Judge.

22 REDIRECT EXAMINATION

23 QUESTIONS BY MR. GRIFFITH:

24 Q. Office Ohmart, I'm going to show you again
25 what's previously been marked and entered into

- 1 evidence as Defense Exhibit G. Do you
2 recognize that area?
- 3 **A.** Yes.
- 4 **Q.** What area is that?
- 5 **A.** It's about the 1600 block of north Woodlawn.
- 6 **Q.** Does that area depict the location where you
7 conducted the field sobriety test on _____
8 _____ ?
- 9 **A.** No, it does not.
- 10 **Q.** Show you what has been marked and submitted as
11 Defense Exhibit F. Do you recognize that
12 photo?
- 13 **A.** Yes.
- 14 **Q.** What is that?
- 15 **A.** It's also the 1500 block of north Woodlawn on
16 the east side of street and 1600 block on the
17 west.
- 18 **Q.** Does that photograph indicate the area where
19 you conducted the field sobriety tests on _____
20 _____?
- 21 **A.** No.
- 22 **Q.** What is the area that you conducted field
23 sobriety tests on _____ in relation to
24 that photograph?
- 25 **A.** South of that photograph.

- 1 Q. And in photograph G, do you see the row of
2 trees located between the sidewalk and the
3 curb?
- 4 A. Yes.
- 5 Q. How many trees do you see depicted in that
6 photograph between the sidewalk and curb?
- 7 A. You want the whole list all the way down the
8 block?
- 9 Q. As far as you can see there.
- 10 A. I think 11 approximately.
- 11 Q. Does that row of trees -- does that row of
12 trees continue on south of that location at the
13 same rate?
- 14 A. No.
- 15 Q. How does that area differ south of this
16 location?
- 17 A. Sidewalk south of that location is closer to
18 the curb line and then it kind of weaves back
19 in behind the trees and the trees pick up
20 between the sidewalk and the road.
- 21 Q. Is there an area south of this location where
22 there are no trees between the sidewalk and the
23 street?
- 24 A. Yes.
- 25 Q. How are you familiar with that location?

1 **A.** That is the location where I did the field
2 sobriety evaluations.

3 **Q.** Was there anything that night, Officer, to
4 block the light from your patrol car over to
5 the sidewalk?

6 **A.** No.

7 **Q.** Was there anything that night to block any
8 ambient light coming from the street on
9 Woodlawn to that sidewalk on Woodlawn?

10 **A.** No.

11 **Q.** Officer, I'm going to show you what's been
12 previously marked as Defendant's Exhibit A.
13 Do you recognize that photo?

14 **A.** Yes.

15 **Q.** What is that?

16 **A.** Intersection of Rockhill and Woodlawn.

17 **Q.** And I'm also going to show you what's been
18 marked as Defendant's Exhibit C. What do you
19 see in that photo?

20 **A.** Intersection of Rockhill -- I'm sorry, Rock
21 Road and Bradley Fair.

22 **Q.** What do you see in the middle of Defense
23 Exhibit C?

24 **A.** The curb and median, trees and grass as well as
25 some other shrubs.

1 Q. And do you see any island or median like that
2 depicted in Defense Exhibit A?

3 A. No.

4 Q. When you passed _____ that night, was his
5 headlights on?

6 A. Yes.

7 Q. There has been earlier testimony that that was
8 a dark street. Were his headlights
9 illuminating that street?

10 A. Yes.

11 Q. Have you been down the street after dark?

12 A. Yes.

13 Q. Have you noticed any islands in the middle of
14 the street?

15 A. No.

16 Q. If there was an island similar to that depicted
17 in Exhibit C, do you believe based on your
18 experience in that area that he would see it?

19 A. Yes.

20 Q. I'm also going to show you what has been
21 identified as Defendant's Exhibit I. Did you
22 take any wind measurements that night?

23 A. No.

24 Q. What time did you do the field sobriety testing
25 on _____?

- 1 **A.** Started between 1:35 and 2:00.
- 2 **Q.** And would you agree with me, Officer, in
3 looking at -- I will show you Defense Exhibit
4 I, but in looking at that, does that document
5 depict any time breakdown for the date of May
6 11th?
- 7 **A.** Not that I see.
- 8 **Q.** Does it appear -- strike that. How long have
9 you lived in Wichita?
- 10 **A.** I've lived in the area all my life.
- 11 **Q.** Are you familiar with where Mid-Continent
12 Airport is located?
- 13 **A.** Yes.
- 14 **Q.** Are you familiar with where Jabara Airport is
15 located?
- 16 **A.** Yes.
- 17 **Q.** Which is closer to the location you were at
18 that night, Mid-Continent or Jabara?
- 19 **A.** Jabara.
- 20 **Q.** At this point, City would move to admit City's
21 Exhibit 1, which is NOAA records for weather
22 measurements taken at Jabara Airport on May
23 11th, 2003. This is an hourly breakdown that
24 would that show between the hours of 0054 and
25 0154, that the peak wind gusts measured at

1 Jabara measured in knots would be between 9 and
2 10 knots, translating to nine-and-a-half to 10
3 miles per hour.

4 MR. SCHOENHOFER: That's fine, Your
5 Honor, I have no objection to this at all.

6 THE COURT: It's admitted. If I
7 recall correctly, a knot is about 1.15 miles
8 per hour?

9 MR. GRIFFITH: Your Honor, I actually
10 took the liberty to calculate, 9 knots converts
11 to 10.3570 miles per hour.

12 THE COURT: 1.15 miles per hour.

13 MR. GRIFFITH: Yes.

14 Q. (By Mr. Griffith) Officer, prior to your
15 testimony today you had an opportunity to look
16 at the videotape; is that correct?

17 A. Correct.

18 Q. Does that videotape depict the location where
19 you would conducted field sobriety tests on ____
20 _____ that night?

21 A. No, it does not.

22 Q. When you had contact with _____ that night
23 and when you first observed him, was he parked
24 or was he just waiting at the light or could
25 you tell?

1 A. Couldn't tell.

2 Q. Counsel under cross crossed you extensively on
3 why you didn't make contact with _____ at
4 that time, correct?

5 A. Correct.

6 Q. Is it legal to make a right turn on red in the
7 City of Wichita?

8 A. Yes.

9 Q. From where _____ was at, could he have
10 made a right turn there on that red light
11 without violating the ordinance?

12 A. No.

13 Q. Could he have backed up and repositioned
14 himself in the proper lane to make a right
15 turn?

16 A. Correct.

17 Q. Did you receive any notification from dispatch
18 that night concerning any malfunction of that
19 light?

20 A. No.

21 Q. _____ have a cell phone with him?

22 A. I don't recall.

23 Q. To your knowledge, did he ever contact police
24 and tell them that the light at Rockhill was
25 malfunctioning?

1 **A.** Not to my knowledge.

2 **Q.** Officer, would you consider this a light
3 malfunction or a driver malfunction?

4 **A.** Driver.

5 **Q.** Do you recall exactly when Officer Little
6 arrived that night?

7 **A.** It would have been before we started the field
8 sobriety evaluation.

9 **Q.** Do you recall if you contacted anyone for
10 backup or backup was just sent?

11 **A.** It's automatically sent.

12 **Q.** That night, did you give any consideration as
13 far as when to begin field sobriety with regard
14 to when Officer Little arrived?

15 **A.** I usually wait until backup officer arrives
16 before I initiate the test.

17 **Q.** Officer, when you give standardized field
18 sobriety tests, do you explain those the same
19 every time?

20 **A.** Yes.

21 **Q.** Do you demonstrate them the same every time?

22 **A.** Yes.

23 **Q.** When you fill out your report, do you find it
24 test necessary to put each and every detail of
25 that explanation in your report?

1 A. No.

2 Q. Is it possible in your report that you maybe
3 had omitted certain details?

4 A. Yes.

5 Q. When you had contacted _____ that night,
6 did he appear overweight to you?

7 A. What is your definition of overweight? I'm
8 overweight in my definition.

9 Q. How tall are you? j

10 A. Six-two.

11 Q. How much do you weigh?

12 A. 275.

13 Q. Are you at least 50 pounds overweight by
14 national standards?

15 A. Yes.

16 Q. Did you have any problem conducting those field
17 sobriety tests that night?

18 A. No.

19 MR. GRIFFITH: Nothing further.

20 RECROSS EXAMINATION

21 QUESTIONS BY MR. SCHOENHOFER:

22 Q. You were asked several questions about Exhibit
23 A and C. Just briefly, again, regarding
24 Exhibit A, you will agree with me that this
25 road is not designated with any centerlines?

- 1 **A.** Correct.
- 2 **Q.** All right. And you will agree with me that
3 there's more than just a few trees that appear
4 in Exhibit G east of the sidewalk that appears
5 in that exhibit?
- 6 **A.** Correct.
- 7 **Q.** In fact, you can clearly see 10 trees or more
8 there; would you agree with me?
- 9 **A.** Correct.
- 10 **Q.** All right. Are you familiar with how NOAA
11 conducts its research of weather?
- 12 **A.** No, I'm not.
- 13 **Q.** Are you familiar with the reports at all?
- 14 **A.** No.
- 15 **Q.** Do you know where those are average speeds or
16 also indicative of what gusts were at any given
17 point in time?
- 18 **A.** No.
- 19 **Q.** You didn't do any personal record-keeping of
20 what the weather was like that night?
- 21 **A.** No.
- 22 **Q.** Would you have any reason to dispute it if____
23 _____ took the stand and testified that the
24 wind was gusting while he was taking the test?
- 25 **A.** No.

1 Q. You will also agree with me that the training
2 you received on the standardized field sobriety
3 tests don't state that an overweight officer
4 can't conduct the tests, correct?

5 A. Correct.

6 Q. What is to be taken into consideration is the
7 weight of the testee or the person being
8 tested, correct?

9 A. Correct.

10 MR. SCHOENHOFER: Okay. I have no
11 further questions, Your Honor.

12 MR. GRIFFITH: Nothing further of the
13 officer, Your Honor.

14 MR. SCHOENHOFER: Your Honor, may I
15 see the Court file.

16 THE COURT: This would be a good time
17 to break, we haven't had a morning recess.

18

19 (End of requested portion of transcript)

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CERTIFICATE

STATE OF KANSAS)
) ss:
SEDGWICK COUNTY)

I, Jeffrey J. Elliott, a Certified
Shorthand Reporter within and for the State of Kansas,
certify that the foregoing is a transcript of the
proceedings had in this matter at the aforementioned
time and place.

IN WITNESS WHEREOF, I have hereunto set
my hand and official seal at Wichita, Kansas, this
27 day of Sept, 2004.

JEFFREY J. ELLIOTT, CSR
BARBER & ASSOCIATES
Certified Shorthand Reporter
1411 North St. Paul
Wichita, Kansas 67203

COSTS:

