

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. [REDACTED]

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THE STATE OF TEXAS

IN THE COUNTY CRIMINAL

Plaintiff,

COURT NO. [REDACTED]

VS

[REDACTED]

DALLAS COUNTY, TEXAS

Defendant.

TRIAL BEFORE A JURY

On the 25th day of April, 2005, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Judge Tom Fuller, Judge presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by _____

FORM 42-15 PERIODIC 1-800-651-4888

(PROCEEDINGS)

1 The following testimony was given by Alvin Finkley

2

3 STATE: The State calls Alvin Finkley.

3

4 (Whereupon the witness was sworn and testified as follows)

5

6 STATE: Would you please state your name and spell
7 it for the court reporter?

8

9 FINKLEY: Good afternoon my name is Alvin Finkley,
10 F-I-N-K-L-E-Y.

10

11 STATE: How are you employed?

11

12 FINKLEY: As a technical supervisor over area 23.

12

13 STATE: How long have you been employed at that
14 position?

13

15 FINKLEY: Approximately five years.

15

16 STATE: Please state your educational background
17 and qualifications for that position.

16

18 FINKLEY: Bachelors of Science in Chemistry and a
19 Masters of Science in Ocular Pharmacology and I have successfully completed the
20 courses required by the Texas Department of Public Safety to be a certified technical
21 supervisor.
22

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24 STATE: What are your duties and responsibilities as
25 a technical supervisor?

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OFFICIAL COURT REPORTER, COUNTY CRIMINAL COURT NO. 5

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STATE:

If on November 22, 2003 Officer Cathcart

~~operating in its proper fashion the subject obtained a test result of .119 what~~
~~opinion is it~~

FINKLEY:

It's my opinion that at an alcohol

concentration such as this today an individual would not be able to safely operate a
motor vehicle.

STATE:

I pass this witness.

DEFENSE:

Mr. Finkley that last question was

conditional wasn't it? In other words she asked if the test was given and if it was given
and was operating in its proper fashion, correct?

FINKLEY:

That's correct.

DEFENSE:

You would agree wouldn't you sir that just

because the machine says something doesn't make it so, you would agree with that
wouldn't you?

FINKLEY:

Sure that's why I have to review the

information.

DEFENSE:

You would also agree wouldn't you that

obviously if you knew the results were inaccurate you wouldn't be testifying, correct?

FINKLEY:

If I didn't stand by this test I wouldn't be

here today.

BARBARA BATES, CSR

OFFICIAL COURT REPORTER, COUNTY CRIMINAL COURT NO. 5

FORM A2-12 FRI 10-1-00 1-400-821-888

is what I base my opinion on.

1
2 STATE: If on November 22, 2003 Officer Cathcart
3 conducted a breath test using the intoxilyzer 5000, serial no.68002260 and it was
4 operating in its proper fashion the subject obtained a test result of .119 what were
5 opinion be of that person's ability to safely operate a motor vehicle?

6 FINKLEY: It's my opinion that at an alcohol
7 concentration such as this today an individual would not be able to safely operate a
8 motor vehicle.

9
10 STATE: I pass this witness.

11 DEFENSE: Mr. Finkley that last question was
12 conditional wasn't it? In other words she asked if the test was given and if it was given
13 and was operating in its proper fashion, correct?

14 FINKLEY: That's correct.

15 DEFENSE: You would agree wouldn't you sir that just
16 because the machine says something doesn't make it so, you would agree with that
17 wouldn't you?

18
19 FINKLEY: Sure that's why I have to review the
20 information.

21 DEFENSE: You would also agree wouldn't you that
22 obviously if you knew the results were inaccurate you wouldn't be testifying, correct?
23

24 FINKLEY: If I didn't stand by this test I wouldn't be
25 here today.

1 **DEFENSE:** **May I approach?**

2 **JUDGE:** **Yes.**

3 **DEFENSE:** **Part of your job is to testify, correct?**

4 **FINKLEY:** **That is correct.**

5 **DEFENSE:** **I believe that you indicated that you have**

6 **been a technical supervisor for five years is that correct?**

7 **FINKLEY:** **That is correct.**

8 **DEFENSE:** **And you, where did you receive your**

9 **degrees?**

10

11 **FINKLEY:** **Jarvis Christian College and The University**

12 **of North Texas Health Science Center at Fort Worth and the Texas College of**

13 **Osteopathic Medicine.**

14 **DEFENSE:** **And when did you get your degree sir?**

15 **FINKLEY:** **1994 and 1998.**

16 **DEFENSE:** **Now did you participate in upgrading any of**

17 **these instruments by putting in software upgrade replacing lens, gaskets, chopper**

18 **motor, battery number one, source lamp tubing, power supply, rebuilt celanoid**

19 **number one, clean sample chamber, perform software upgrade and vertical line/ca**

20 **what does ca stand for?**

21

22 **FINKLEY:** **Linear and calibration.**

23 **DEFENSE:** **Did you do any of that on any of these**

24 **instruments, sir?**

FORM 32-13 PERIOD - 1-809-931-8188

- 1 **FINKLEY:** On this particular instrument?
- 2 **DEFENSE:** No on any of these instruments.
- 3 **FINKLEY:** Yes I did.
- 4 **DEFENSE:** But not this one.
- 5 **FINKLEY:** That was done by Kristy Swearingin and he
- 6 name is right there. That's not my name but that's her name right there.
- 7 **DEFENSE:** Were you present when she did this or do
- 8 you know?
- 9 **FINKLEY:** In the office every day.
- 10 **DEFENSE:** Is that a yes or no?
- 11 **FINKLEY:** Yes I was.
- 12 **DEFENSE:** The part of the upgrade is putting new
- 13 software in the instrument that comes from the manufacturer, correct?
- 14 **FINKLEY:** Actually from Austin.
- 15 **DEFENSE:** Well where did they get it sir?
- 16 **FINKLEY:** I don't know where they purchased it you
- 17 would have to call the Capitol to get that information.
- 18 **DEFENSE:** So you don't know where the software comes
- 19 from that you put on these new machines is that correct?
- 20 **FINKLEY:** That's correct. It was a mandate by the
- 21 State, the Texas Department of Public Safety to upgrade all the instruments. We were
- 22 given the software by the State. It was put into our instruments as ordered by the
- 23
- 24

BARBARA BATES, CSR

OFFICIAL COURT REPORTER, COUNTY CRIMINAL COURT NO. 5

P117

State.

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is then.

DEFENSE: Okay so you don't know what the software

FINKLEY: I don't know what it is?

DEFENSE: Yes sir.

FINKLEY: It's a chip that was put into the instrument.

DEFENSE: So you just put a chip in?

FINKLEY: That's correct.

DEFENSE: And you participated in this is that correct?

FINKLEY: Yes I did.

DEFENSE: Is that what turned this instrument into an

EN an enhanced model 5000?

FINKLEY: No the instrument is still a sixty eight it's not

an EN.

DEFENSE: It's not an EN?

FINKLEY: No it's not.

DEFENSE: Now this machine in addition. Can I have

Defense Exhibit Number three admitted?

STATE: No objection.

JUDGE: Defense Exhibit No. Three is admitted.

DEFENSE: These are maintenance records on this

particular instrument from October 22, 2003 to December 22, 2003 correct?

FORM A2-13 PENNSA • 1-800-821-8888

- 1 **FINKLEY:** **That's correct.**
- 2 **DEFENSE:** **This wasn't a normal machine it was a**
 3 **loaner right?**
- 4 **FINKLEY:** **What do you mean a normal machine. It is a**
 5 **regular intoxilyzer.**
- 6 **DEFENSE:** **Instrument removed from service supply**
 7 **and returned to spare status. This was a spare machine, wasn't it?**
- 8 **FINKLEY:** **That's correct.**
- 9 **DEFENSE:** **It stays on the shelf, correct? Normally?**
- 10 **FINKLEY:** **Normally when it's not being used it's**
 11 **plugged in at our office not just stored on a shelf collecting dust.**
- 12 **DEFENSE:** **I take it that it came from Wylie. It was**
 13 **removed from service at Wylie so this was not a spare this was regularly used by the**
 14 **Wylie Police Department wasn't it?**
- 15 **FINKLEY:** **It was a spare that was put in at Wylie**
 16 **because Wylie's regular instrument was out of service so again it is a spare.**
- 17 **DEFENSE:** **Okay so these instruments do break down**
 18 **from time to time, correct?**
- 19 **FINKLEY:** **Instruments need maintenance just like our**
 20 **cars.**
- 21 **DEFENSE:** **And in this particular case not only was the**
 22 **did it receive a software upgrade, replaced lens, gaskets, chopper motor, battery,**
 23
 24

1 source lamp, tubing, power supply, rebuilt celinoid number one, cleaned the sample
2 chamber, performed software upgrade and verified linear calibration, how long does it
3 take to do that?

4 FINKLEY: It all depends if you have time to go out in
5 the field or if you're sitting in court it may take a few days to do all that.

6 DEFENSE: It may take up to two days to do that, right?

7 FINKLEY: Sure or longer sometimes.

8 DEFENSE: Well in this case it appears that this
9 instrument it looks like it took about nine days, does that look right?
10

11 FINKLEY: No. This just indicates when this instrument
12 was done with the inspection and maintenance that was done to it. It doesn't indicate a
13 number of days that it took to do the maintenance.

14 DEFENSE: Right. Defendant's Exhibit Three which
15 was prepared today just indicates that on there's a notation that on the 12th of
16 November 2003 that's the notation. It doesn't indicate how long it took does it?
17

18 FINKLEY: No. That's when the operation was
19 completed.

20 DEFENSE: Have this marked as Defendant's Exhibit
21 next in order. Defendant's Exhibit Four is a test information log on this particular
22 instrument from 22 October 03 to 22 November 03, isn't it?
23

24 FINKLEY: 10/22/03 to 12/22/03.

25 DEFENSE: What it reports is all of the tests that were

run through this instrument during that two month period, correct?

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FINKLEY: That is correct.

DEFENSE: And Defendant's Exhibit 4 indicates that there were inspection tests done on the 5th of November 2003, correct?

FINKLEY: That is correct.

DEFENSE: By Ms. Swearingin, correct?

FINKLEY: That is correct.

DEFENSE: And then it shows that on the 14th of November another inspection test was run on it correct?

FINKLEY: That is correct.

DEFENSE: It doesn't show on it does it sir that any tests were run after the software upgrade, lens, gaskets, chopper motor, battery one, source lamp tubing, power supply, rebuilt celanoid number one, cleaned sample chamber, performed software upgrade on November 12, 2003 there's not a single entry on this test log that anything was run through this instrument is there sir?

FINKLEY: And again I told you that's when the operations were completed on 11/12/2003.

DEFENSE: Is the answer yes or no?

FINKLEY: I can't just answer your question with a yes or no.

DEFENSE: You can look at this record you refreshed your memory from. These are your records. Are you now saying these records are not

FORM J2-13 FENJAO • 1-800-951-8888

1 your memory from. These are your records. Are you now saying these records are not
2 accurate?
3

4 FINKLEY: Absolutely they are. Absolutely accurate.

5 DEFENSE: You relied on this record here to indicate
6 that the instrument was checked on site on November 14th, correct sir?

7 FINKLEY: That is correct.

8 DEFENSE: Now does that mean it's just an indication of
9 when it was finished being checked like this preventative maintenance software
10 upgrade?

11 FINKLEY: It was completed on the 12th just as the
12 records indicate.

13 DEFENSE: When was it started?

14 FINKLEY: Again I told you that before. There is no
15 date that would indicate how many days it took for the operations to be completed on
16 this particular instrument however maintenance was completed on the 12th of October.

17 DEFENSE: It's not part of your procedures of your
18 office to run tests on these instruments after you put software upgrades, rebuilt
19 solenoids, new power supply. It's not part of your procedures to run tests?
20

21 FINKLEY: There are tests that are completed on that
22 instrument.

23 DEFENSE: It's not in this record is it sir?

24 FINKLEY: No that's a test log so that means while the
25

1 instrument is out in the field those are the tests that are conducted on that instrument
2 while it's out in the field not in the office. So anything that's conducted in the office is
3 not going to be indicated on that subject log table.

4
5 DEFENSE: I asked for all the tests that were run
6 through this instrument for a two-month period. Are you now telling me that you *didn't*
7 bring them all?

8 FINKLEY: You had the subject test and our inspections
9 that were done in the field and that's exactly what I.....

10 DEFENSE: Is that a yes or no sir?

11 FINKLEY: That's what I have brought today and I
12 cannot answer that with a yes or no.

13 DEFENSE: Sir you were requested to bring every test
14 record that was run through that instrument for a two-month period. Are you now
15 telling me that there are other test records that you did not bring? Yes or no.

16 FINKLEY: No. And what you have today are the
17 subject tests that were conducted in the field not only the live subject tests including
18 your client but also the ones that were conducted by the technical supervisors.

19 DEFENSE: And no where in this does it indicate that
20 this instrument was given an inspection test or tested after Ms. Swearingin put that
21 software upgrade in there.

22
23 FINKLEY: No but you have on this one that it was
24 inspected and tests were run on it by Ms. Swearingin on this particular day. It's not

1 instrument is out in the field those are the tests that are conducted on that instrument
2 while it's out in the field not in the office. So anything that's conducted in the office is
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22 inspected and tests were run on it by Ms. Swearengin on this particular day. It's not

