

VOIR DIRE ON PRETRIAL AND IN-COURT IDENTIFICATION

Robert Farb (UNC School of Government, Mar. 2015)

Contents

I.	Introduction	1
II.	Findings of Fact	2
III.	Conclusions of Law	7
IV.	Order	9
V.	In-Court Identification	9

I. Introduction. Identification procedures are subject to constitutional and statutory requirements. As to the constitutional requirements, the Due Process Clause bars suggestive identification procedures. Additionally, a defendant also has a Sixth Amendment right to the presence of counsel when the defendant personally appears in a lineup or showup at or after the right to counsel has attached. For a discussion of these legal issues, see ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 558-60 (4th ed. 2011) (hereafter, *ARREST, SEARCH AND INVESTIGATION*) and the 2014 cumulative supplement (hereafter, *supplement*) at 73.

In addition to these constitutional issues, several statutory provisions regulate live and photo lineups. See G.S. 15A-284.50 through 15A-284.53. These statutes were enacted in 2007 and apply to lineups conducted on or after March 1, 2008. Note that G.S. 15A-284.52(d) sets out three statutory remedies for a violation of the statutory provisions governing live and photo lineups. First, failure to comply with any of the requirements “shall be considered by the court in adjudicating motions to suppress eyewitness identification.” Thus the court must take a violation into account, but a violation does not necessarily require suppression. It appears that the court is to consider whether a violation constitutes a substantial statutory violation requiring suppression under G.S. 15A-974. The court also may consider whether a failure to follow the specified procedures affects the reliability of the identification requiring suppression under the Due Process Clause. The statute does not explicitly address the question, but presumably the court also may consider whether a failure to follow the lineup requirements tainted a subsequent identification, rendering that identification inadmissible.

Second, the failure to comply with any statutory requirement is admissible in support of any allegation of eyewitness misidentification as long as the evidence is otherwise admissible. Thus, as part of the case at trial, a defendant may offer evidence of a failure to follow the requirements to show that an eyewitness’s identification is unreliable.

Third, when evidence of compliance or noncompliance has been presented at trial, the jury must be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of an eyewitness identification. This provision suggests that, in support of an eyewitness identification, the State may present evidence at trial that it complied with the eyewitness identification procedures—if the evidence is otherwise admissible under the Confrontation Clause and the North Carolina Rules of Evidence.

For an additional discussion of the statutory provisions on pretrial identification, see *ARREST, SEARCH, AND INVESTIGATION* at 561-62 and its supplement at 73.

Sections II and III below set out proposed findings of fact and conclusions of law for a voir dire on pretrial and in-court identification that incorporates these constitutional and statutory requirements.

II. Findings of Fact.

A. Generally. All facts must be supported by clear and convincing evidence. The trial judge should include as many facts as are relevant to the case and be sure those facts support the conclusions of law.

B. Findings to Include in Every Case. Assuming they are supported by the evidence, the trial court's order should include the following findings of fact:

- The defendant was personally present in open court with his or her counsel.
- The evidentiary hearing was held in the absence of the jury.
- The trial court had an opportunity to see and observe each witness and to determine what weight and credibility to give to each witness's testimony.

C. Pretrial Identification Testimony.

1. Generally. When dealing with pretrial identification testimony generally, the trial court's findings should include facts pertaining to suggestiveness and reliability as well as facts relevant to the North Carolina statutory provisions. Note that pretrial identification testimony includes any offer of testimony about a witness viewing a defendant in a confrontation (e.g., one-on-one showup), live lineup, photographic lineup, or other identification procedure. It is recommended that the trial court's finding of fact address:

- When and where crime happened.
- Lighting conditions at crime scene.
- Closeness of witness to perpetrator during commission of crime.
- Length of time witness was in presence of perpetrator at crime scene.
- Degree of attention by witness toward perpetrator during crime.
- Absence or presence of normal hearing or vision, or corrected hearing or vision, or hearing or vision handicaps.
- Absence or presence of mask or other concealing clothing or facial hair on perpetrator's person at time of crime.
- Accuracy of prior description given by the witness to law enforcement. It is recommended that the trial court make findings regarding what the witness previously reported to law enforcement, such as the perpetrator's physical characteristics, clothing worn, vehicle used, etc. These may include such known physical characteristics of the accused as sex, race, age, height, weight, eye color, head hair, facial hair, and prominent features generally.
- Length of time between the crime and the pretrial identification procedure or confrontation (e.g., one-on-one showup).

- Level of certainty expressed by the witness in his or her identification made at the pretrial identification procedures, such as lack of uncertainty or hesitancy.
- Whether the witness knew accused or had had any contact with the accused before the crime.
- Whether the witness made a prior misidentification of another person or refused to identify another person during the pretrial identification procedures.
- Whether the witness made an identification of the accused at a time after the crime but before the pretrial identification procedure.
- Any suggestive statements made by law enforcement to the witness about the accused before, during, or after the identification procedure.
- Any suggestive statements made by another witness or other person about the accused before, during, or after the identification procedure.
- Whether other witnesses viewed the accused separately or in the presence of other witnesses during the pretrial identification procedure.
- When the pretrial identification procedure took place relative to the accused's indictment by grand jury or appearance at a probable cause hearing.
- Presence or absence of a lawyer for the accused at the time of the pretrial identification procedure, or voluntary and knowing waiver of a lawyer.

2. Live Lineup. If pretrial identification procedure is a live lineup, the trial court also should make findings regarding:

- Whether the lineup was conducted by an independent administrator. See G.S. 15A-284.52(b)(1).
- Whether before the lineup was conducted, instructions as specified in G.S. 15A-284.52(b)(3) were given to the eyewitness by the independent administrator, and the eyewitness acknowledged the receipt of the instructions in writing. Note that if the eyewitness refused to sign the acknowledgement, the lineup administrator must note the refusal and sign the acknowledgement. The trial court should make this finding when appropriate.
- Whether all lineup participants are out of view of the eyewitness before the lineup. See G.S. 15A-284.52(b)(9).
- The number of persons in lineup and whether it included at least five non-suspects. See G.S. 15A-284.52(b)(5)c. Note that if there were multiple eyewitnesses, the suspect must be placed in a different position in the lineup for each eyewitness. See G.S. 15A-284.52(b)(6). The trial court should make findings on this issue when appropriate.
- Whether only one suspect was in the lineup. See G.S. 15A-284.52(b)(10).

- The sex, age, height, weight, hair color and style, distinguishing features of other people in the lineup (i.e., fillers who are not suspected of the offense) compared to those of the accused. The trial court also should make findings regarding the extent to which fillers resembled accused as required by G.S. 15A-284.52(5). Note that if the eyewitness had previously viewed a photo or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates must be different from the fillers used in any prior lineups. G.S. 15A-284.52(b)(5)d. Make findings on this issue when appropriate.
- The clothing worn by other people in the lineup compared to those worn by the accused.
- The location of the lineup and method used by law enforcement to present this witness and other witnesses to the lineup.
- Whether any identifying actions, such as speech, gestures, or other movements, were performed by all lineup participants. See G.S. 15A-284.52(b)(8).
- Whether writings or information concerning prior arrest, indictment, or conviction of suspect was visible or made known to the eyewitness. See G.S. 15A-284.52(b)(7).
- Whether photographs or video or audio recordings were made of the lineup. Note that unless impractical, a video record of the lineup must be made. G.S. 15A-284.52(b)(14). If impractical, the reasons must be documented, and an audio record must be made.*Id.* If neither a video nor audio record are practical, the reasons must be documented, and the lineup administrator must make a written record of the lineup.*Id.* Note that whether video, audio, or in writing, the record must include all of the factors set out in G.S. 15A-284.52(b)(15).
- What, if anything, was said to the eyewitness concerning the suspect's position in the lineup or anything that might influence the identification. See G.S. 15A-284.52(b)(11).
- Whether anyone was present during the lineup who knew the suspect's identity, other than the eyewitness and counsel as required by law. See G.S. 15A-284.52(b)(13).
- Whether the lineup administrator separated all witnesses from conferring with one another before or during the identification procedure. See G.S. 15A-284.52(b)(12).
- Whether each witness was given instructions concerning the identification procedure without the presence of other witnesses. See G.S. 15A-284.52(b)(12).
- The absence or presence of any event or circumstance "singling out" the accused.
- Whether the lineup administrator sought and documented from the eyewitness a clear statement about his or her confidence level that the person identified in the lineup was the perpetrator. See G.S. 15A-284.52(b)(12).
- Whether the eyewitness who identified a person as a perpetrator was provided any information concerning the person before the

lineup administrator obtained the eyewitness's confidence statement about the selection. See G.S. 15A-284.52(b)(13).

3. **Display of Photographs.** If the pretrial identification procedure was by display of photographs, the trial court's findings of facts should address:
- Whether it was conducted by independent administrator or alternative method approved by Criminal Justice Education and Training Standards Commission. See G.S. 15A-284.52(c) (setting out the authorized alternative methods).
 - The number of photographs viewed by the witness and whether photos of at least five non-suspects were included. See G.S. 15A-284.52(b)(5)b. Note that if there were multiple eyewitnesses, the suspect's photograph must be placed in a different position in the lineup for each eyewitness. See G.S. 15A-284.52(b)(6). The trial court should make findings on this issue when appropriate.
 - Whether the photograph of the suspect was contemporary, and to the extent practicable, resembled the suspect's appearance at the time of the offense. See G.S. 15A-15A-284.52(b)(4).
 - The sex, age, height, weight, hair color and style, distinguishing features of other photographed persons (fillers) compared to photograph of the accused and the extent to which fillers resembled accused as required by G.S. 15A-284.52(5). Note that if the eyewitness had previously viewed a photo or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates must be different from the fillers used in any prior lineups. G.S. 15A-284.52(b)(5)d. The trial court should make findings on this issue when appropriate.
 - Whether only one suspect was included in the lineup. See G.S. 15A-284.52(b)(10).
 - Presence or absence of law enforcement identification or arrest numbers on the photograph of the accused compared to other photographs used in the pretrial identification procedure.
 - Whether any writings or information concerning prior arrest, indictment, or conviction of the suspect was visible or made known to the eyewitness. See G.S. 15A-284.52(b)(7). Note that identification or arrest numbers should be covered over before photographs are shown to the jury.
 - The manner of display of photographs to the witness.
 - What, if anything, was said to the eyewitness concerning the suspect's position in the photo lineup or anything that might influence the identification. See G.S. 15A-284.52(b)(11).
 - Whether anyone was present during the lineup who knew the suspect's identity, other than the eyewitness and counsel as required by law. See G.S. 15A-284.52(b)(13).
 - Whether the lineup administrator separated all witnesses from conferring with one another before or during the identification procedure. See G.S. 15A-284.52(b)(12).

- Whether a video record of the lineup was made. Note that unless impractical, a video record of the lineup must be made. G.S. 15A-284.52(b)(14). If impractical, the reasons must be documented, and an audio record must be made.*Id.* If neither a video nor audio record are practical, the reasons must be documented, and the lineup administrator must make a written record of the lineup.*Id.* Whether video, audio, or in writing, the record must include all of the factors set out in G.S. 15A-284.52(b)(15).
- Whether each witness was given instructions concerning the identification procedure outside the presence of other witnesses. See G.S. 15A-284.52(b)(12).
- The absence or presence of any event or circumstance "singling out" the accused.
- Whether the lineup administrator sought and documented from the eyewitness a clear statement about his or her confidence level that the person identified in the lineup was the perpetrator. See G.S. 15A-284.52(b)(12).
- Whether an eyewitness who identified a person as a perpetrator was provided any information concerning the person before the lineup administrator obtained the eyewitness's confidence statement about the selection. See G.S. 15A-284.52(b)(13).

4. Confrontation or Showup. If the pretrial identification procedure is by confrontation or showup (e.g., viewing the accused on the street, at a workplace, or in a courtroom) the trial court should make factual findings regarding:

- The number of other persons viewed by the witness at or near the same time he or she viewed the accused, which persons had similar physical characteristics to those of accused.
- The absence or presence of any event or circumstance at the viewing that "singled out" or focused the witness's attention on the accused.

- III. Conclusions of Law.** What follows is sample language for a trial court order finding that evidence of a pretrial identification is admissible (but the language should be modified as appropriate if the trial court order finds that the evidence is inadmissible):

Upon the foregoing findings of fact, the court concludes as a matter of law that:

1. The identification of the accused by the witness is not inherently incredible, given all the circumstances of the witness's ability to view the accused at the time of the crime. The credibility of the identification evidence is for the jury to weigh.

2. The pretrial identification procedure involving defendant was not so impermissibly suggestive as to violate defendant's right to due process of law.

3. The pretrial identification procedure involving defendant, even if impermissibly suggestive, was reliable and did not produce a substantial likelihood of misidentification, given the totality of circumstances surrounding this identification procedure, in that:

a. The witness's opportunity to view the accused and observe the physical characteristics of the accused was ample and sufficient to gain a reliable impression of the accused at the time of the crime.

b. The witness's degree of attention was strong and focused on the accused during the time the witness viewed the accused at the scene of the crime.

c. The witness's description of the accused given to law enforcement shortly after the crime was highly accurate and matches the known physical characteristics of the accused.

d. The witness's level of certainty that the accused was the same person the witness observed at the scene of the crime was firm and unequivocal.

e. The time lapse between the crime and the pretrial identification procedure was not so long as to significantly diminish the witness's ability to make a strong and reliable identification of the perpetrator.

f. All other circumstances and events surrounding the crime and the pretrial identification procedure support the conclusion that the identification testimony by the witness possesses sufficient aspects of reliability.

4. [Alternative 1] There were no violations of G.S. 15A-284.52 in conducting the pretrial identification.

[Alternative 2] The following [violation] [violations] of G.S. 15A-284.52 [was] [were] committed in conducting the pretrial identification: [name them]. However, [this violation] [these violations] do not require suppression of evidence of the pretrial identification under G.S. 15A-974.

NOTE: If evidence is to be excluded, the conclusions of law above must be amended accordingly. Also, G.S. 15A-284.52(d) provides other remedies for compliance or noncompliance with G.S. 15A-284.52. See the discussion of these other remedies under Section I above.

5. *[Legal counsel was present on behalf of the accused at the time of the procedure.]*

or

[The defendant voluntarily and knowingly waived [his] [her] right to assistance of legal counsel at the time the pretrial identification procedure took place.]

or

[The defendant had no Sixth Amendment right to assistance of legal counsel at the time the pretrial identification procedure took place, as defendant was not, at that time, formally charged with an offense now at issue in the proceeding.]

IV. Order.

It is now therefore ordered that defendant's objection to the admission of evidence of [describe pretrial identification procedure] is [overruled] [allowed] and that the evidence of the pretrial identification [is] [is not] competent in the trial of this case.

V. In-Court Identification.**A. Additional Findings of Fact.**

The in-court identification of the accused by the witness is based solely upon the recollection of the witness at the time of the crime and is not influenced by any pretrial identification procedure.

B. Additional Conclusions of Law.

Based on clear and convincing evidence, the in-court identification of the accused is of independent origin, based solely upon what the witness saw at the time of [name offense], and is not tainted by any pretrial identification procedure so impermissibly suggestive and conducive to irreparably mistaken identification as to constitute a denial of due process of law: the witness had ample opportunity to view the accused at the time of the crime, the witness had a high degree of concentration and focused attention on the accused at the time of the crime, the witness's prior description of the accused shortly after the crime is a reasonably accurate description of the accused, the degree of certainty in the witness's identification is high, and the pretrial identification procedure did not taint the ability of the witness to testify as to an in-court identification of independent origin.

C. Order for In-Court Identification.

It is now therefore ordered that the defendant's objection to the admission of in-court identification evidence is [overruled] [allowed] and that evidence of the in-court identification [is] [is not] competent in the trial of this case.