

VOIR DIRE

Voir Dire On Pretrial and In-Court Identification

Source: NORTH CAROLINA TRIAL JUDGES' BENCH BOOK, SUPERIOR COURT, VOL. 1 (Criminal), Chap. 63 (3rd ed.) (Institute of Government 1999)

I. FINDINGS OF FACT

All facts must be supported by clear and convincing evidence. Include as many fact as are relevant to your case and be sure those facts support the conclusions of law.

A. FINDINGS TO INCLUDE IN EVERY CASE:

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

B. PRETRIAL IDENTIFICATION TESTIMONY: Findings on suggestiveness and reliability factors.

NOTE: Pretrial identification testimony includes any offer of testimony about a witness viewing a defendant in a confrontation, lineup, photographic array, or other identification procedure.

1. When and where crime happened.
2. Lighting conditions at crime scene.
3. Closeness of witness to perpetrator during commission of crime.
4. Length of time witness was in presence of perpetrator at crime scene.
5. Degree of attention by witness toward perpetrator during crime.
6. Absence or presence of normal hearing or vision, or corrected hearing or vision, or hearing or vision handicaps.
7. Absence or presence of mask or other concealing clothing or facial hair on perpetrator's person at time of crime.
8. Accuracy of prior description given by witness to police. What observation and details did witness report to the police about the physical characteristics of perpetrator, clothing worn, auto used, or other details reported. These may include such known physical characteristics of the accused as sex, race, age, height, weight, eye color, head hair, facial hair, prominent features generally.
9. Length of time between crime and pretrial identification procedure or confrontation.
10. Level of certainty expressed by witness in identification made at pretrial identification procedures, such as lack of uncertainty or hesitancy.
11. Whether witness knew accused or had had any contact with accused before the crime.
12. Whether witness made prior misidentification of another person or refused to identify another person during pretrial identification procedures.

13. Whether witness made identification of accused at a time after crime but before the pretrial identification procedure.
14. Any suggestive statements made by police to witness about accused before, during, or after identification procedure.
15. Any suggestive statements made by another witness or other person about accused before, during, or after identification procedure.
16. Whether other witnesses viewed accused separately or in the presence of other witnesses during pretrial identification procedure.
17. When pretrial identification procedure took place relative to accused's indictment by grand jury or appearance at probable cause hearing.
18. Presence or absence of lawyer for accused at time of pretrial identification procedure, or voluntary and knowing waiver of lawyer.
19. If pretrial identification procedure is **lineup**, the following facts:
 - a. Number of persons in lineup.
 - b. Sex, age, height, weight, hair color and style, distinguishing features of other persons in lineup compared to those of the accused.
 - c. Clothing worn by other persons in lineup compared to those worn by the accused.
 - d. Location of lineup and method used by police to present this witness and other witnesses to the lineup.
 - e. Photographs or recordings made of lineup.
 - f. Absence or presence of any event or circumstance "singling out" the accused.
20. If the pretrial identification procedure is by display of photographs, the following facts:
 - a. Number of photographs viewed by the witness.
 - b. Sex, age, height, weight, hair color and style, distinguishing features of other photographed persons compared to photograph of the accused.
 - c. Presence or absence of police identification or arrest numbers appearing on the photograph of the accused compared to other photographs used in the pretrial identification procedure.
NOTE: Such identification or arrest numbers should be covered over before these photographs are shown to the jury.
 - d. Manner or displaying photographs to witness.
 - e. Absence or presence of any event or circumstance "singling out" the accused.
21. If the pretrial identification procedure is by confrontation or showup -- viewing the accused on the street, at a workplace, or in a courtroom -- the following facts:
 - a. Number of other persons viewed by witness at or near the same time he or she viewed the accused, which persons had similar physical characteristics to those of accused.
 - b. Absence or presence of any event or circumstance at the viewing that "singled out" or focused the witness's attention on the accused.

II. CONCLUSIONS OF LAW

A. *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 the police 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.*

NOTE: If evidence is to be excluded, above must be amended accordingly.

4. *[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.]

III. 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.

IV. 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.