

NORTH CAROLINA  
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
CASE NO. [REDACTED]

STATE OF NORTH CAROLINA, )  
)  
)  
vs. )  
)  
)  
DEFENDANT, )  
Defendant. )

MOTION FOR ORDER REQUIRING  
STATE TO PERFORM NON-TESTIMONIAL  
IDENTIFICATION PROCEDURES

Now comes the defendant and pursuant to N.C.G.S. 15A-281 moves this Court to order the State to conduct non-testimonial identification procedures to determine the ability of any State's witnesses to accurately identify the defendant in a neutral out of court setting, utilizing procedures commonly referred to as photographic line-ups and as voice exemplar "line-ups"; and further, to order that any individuals the State may call as witnesses at trial to identify the defendant either visually or auditorily as the perpetrator of the alleged crime(s) be required to participate in such procedures to attempt to identify the perpetrator prior to trial. In support of this motion the defendant shows the Court as follows:

1. Defendant has been charged with the felonious offenses of possession of cocaine and conspiracy to traffic in cocaine by delivery of 28 grams or more, but less than 200 grams, of cocaine.
2. At trial, the State, based on the prosecution file of the State, will attempt to introduce testimony from an eyewitness who claims to have seen the defendant in a motor vehicle in a parking lot on the premises of a motel at the time that a drug transaction allegedly occurred in that motel.

3. At trial, the State, based on the prosecution file of the State, will attempt to introduce testimony from a witness who claims to have spoken with the defendant by telephone regarding the alleged meeting with the seller of the cocaine.
4. The ability of the State's witnesses to identify the defendant is a critical element of the State's case in this matter. The defendant seeks to show by the use of these line-up procedures that the State's witnesses are in fact unable to accurately identify the defendant by sight or by voice.
5. A line-up identification from each of the State's witnesses from whom the State intends to elicit an in-court identification, or testimony about an out-of-court identification, particularly when such identification is based only on recognizing a disembodied voice, is critical to the defendant's ability to challenge as unsubstantiated such in-court identification.
6. As the Court is well aware, an in-court identification where the defendant is clearly already identified to the witness as the individual seated at the defense table with his attorney is fundamentally prejudicial to the defendant.
7. The only reasonable defense to the identifications referenced herein is to show the jury that when the witness in question had to actually select the defendant from a series of persons they were unable to do so. In order to have such evidence the defendant must have an opportunity for a non-testimonial identification from each anticipated witness.
8. The granting of an order for non-testimonial identification procedures would be of material aid in determining whether this defendant in fact committed the alleged offenses, and such an order is constitutionally required in this case in order for the defendant's Sixth Amendment right to a fair trial to be insured.

Wherefore, the defendant requests that this Court enter an order requiring the State to conduct a non-testimonial identification procedure for a photographic line-up and voice exemplar identification of the defendant for each witness from whom the State seeks to elicit any in-court identification testimony or testimony about an out-of-court identification.

Defendant requests that all such photographic line-ups consist of no less than eight photographs of persons with similar build, hairstyle, facial hair, and race to the defendant, utilizing the procedure recommended by the Chief Justice's Actual Innocence Commission; that the photo line-up utilized not be the same as any used previously; that all voice lineups consist of no less than six voice samples from persons with similar vocal and linguistic characteristics, accents, diction, pronunciation and grammatical usage to the defendant and that all such procedures take place in the presence of defendant's counsel; that defendant's counsel approve the photo and voice line-ups prior to their use, or if defendant's counsel objects, that the Court review and approve such line-ups prior to their use; that the defendant's counsel be present at any such photographic or voice line-up identification; that prior to participating in the photo line-up identification procedure, prosecution witnesses state in writing under oath the number of times they have viewed photographs or other indicia of the alleged conspirator's likeness, or the defendant personally or any indicia of his likeness, and the date, nature and source of such indicia; that prior to participating in the voice line-up identification procedure, prosecution witnesses state in writing under oath the number of times they have spoken with the defendant and the basis upon which they claim to be able to recognize the voice of the alleged conspirator and the basis upon which they associate that voice with the defendant.

Respectfully submitted this the \_\_\_\_\_ day of \_\_\_\_\_, 2005.

By: \_\_\_\_\_

Cara Smith  
Attorney for the Defendant  
Suite 400, 8 West Third Street  
Winston-Salem, NC 27101  
Telephone: (336) 761-2510

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion for Order Requiring State to Perform Non-Testimonial Identification Procedures) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the Forsyth County District Attorney properly addressed to:

Name  
Assistant District Attorney  
Fifth Floor, Forsyth County Hall of Justice  
Winston-Salem, NC 27101

This, the \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
Cara Smith

NORTH CAROLINA  
FORSYTH COUNTY

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CASE NO. [REDACTED]

STATE OF NORTH CAROLINA, )  
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DEFENDANT’S NAME, )  
Defendant. )

ORDER REQUIRING  
STATE TO PERFORM NON-TESTIMONIAL  
IDENTIFICATION PROCEDURES

This matter coming on for hearing before the undersigned upon motion of the defendant pursuant to N.C.G.S. 15A-281 for an Order of this Court requiring the State to conduct non-testimonial identification procedures in this case, the Court, based upon its review of the court file and arguments of counsel, makes the following findings of fact and enters the following Order:

FINDINGS OF FACT:

1. The defendant has been charged with the felonious offenses of possession of cocaine and conspiracy to traffic in cocaine by delivery of 28 grams or more, but less than 200 grams, of cocaine.
2. The State intends to elicit in court identification testimony, or testimony about an out-of-court identification, from certain witnesses purporting to be able to identify, by sight or by voice, the defendant as the perpetrator of the charged offense.
3. The defendant intends to challenge each such witness’ ability to make such an in court identification or to testify about an out-of-court identification with any accuracy.
4. In order to challenge such anticipated in-court identification or testimony about an out-of-court identification, defendant must be able to assert evidence of each such witness’ prior inability to identify the defendant when offered a non-prejudicial opportunity to do so.
5. The only such non-prejudicial opportunity to obtain such identification ability evidence would be provided by line-up identifications.
6. Accordingly, photographic and voice exemplar line up identification procedures are necessary for each witness from whom the State intends to elicit any in court identification testimony, or any testimony about an out-of-court identification; would be of material aid in determining whether this defendant in fact committed the alleged offenses; and are required in order to ensure the defendant’s right to a fair trial.

Based upon foregoing findings of fact, this Court hereby ORDERS:

1. For each witness the State intends to call at trial of this matter and from whom the State seeks to elicit in-court identification testimony regarding the defendant, or testimony about an out-of-court identification of the defendant, the State shall conduct an identification procedure commonly referred to as a line-up. If the in-court identification or testimony is to be based on visual recognition of the defendant, the nontestimonial identification procedure shall be a photographic line-up. If the in-court identification or testimony is to be based on auditory recognition of the defendant, the nontestimonial identification procedure shall be a voice exemplar line-up.
  2. Each such line up shall be conducted under the following conditions.
  3. The time, place and manner of each line up shall be mutually agreed upon between the prosecutor and defense counsel.
  4. Defense counsel shall be permitted to be present at all stages of the proceeding.
  5. Prior to participating in a photo line-up identification procedure, prosecution witnesses shall state in writing under oath the number of times they have viewed photographs or other indicia of the alleged conspirator's likeness, or the defendant personally or any indicia of his likeness, and the date, nature, and source of such indicia.
- C. Any photographic line-up shall consist of not less than eight persons, including the defendant, of similar build, hairstyle and facial hair, and race to the defendant.**
- D. Each witness to a photographic line-up shall be asked to identify the defendant utilizing only the standard Winston-Salem Police Department line up instructions, modified as necessary to conform to single viewing of each participant in the identification procedure, and such instructions shall be read to each witness in the presence of defense counsel.**
- E. The identifying and descriptive information, such as name, race, height, weight, and hairstyle and facial hairstyle of the persons and the relative order of presentation of the persons contained in the photographic line-up shall be recorded in written format and filed with the Court.**
- F. Each photo line-up shall utilize the procedure recommended by the Chief Justice's Actual Innocence Commission. Each photo of the identification procedure participants shall be displayed sequentially, by a person without knowledge as to the identity of the alleged perpetrator, to each witness, outside the presence of any other witness. The Winston-Salem Police Department is**

hereby ordered to prepare and conduct such photo line-ups and procedures as may be necessary. The Winston-Salem Police Department is further ordered to ensure that any picture of the defendant utilized in said photo line-up is that picture created as close to the alleged date of the offense of August 4 through August 19, 2004 as is available. Additionally, any individual photograph or photo line-up previously seen by the witnesses, if any, shall not be used, and no photo line-up shall be used more than once. If Defense Counsel objects to the utilization of a particular photo line-up, and the parties are not able to agree on any corrected photo line-up, such photo line-up shall not be utilized without a prior ruling by the Court authorizing the use of such photo line-up. Each actual photo line-up utilized shall be filed as of record with the Court, as well as the results of each use of the respective photo line up.

- G. Prior to participating in a voice line-up identification procedure, prosecution witnesses shall state in writing under oath the number of times they have spoken with the defendant and the basis upon which they claim to be able to recognize the defendant's voice.**
- H. Any voice exemplar line-up shall consist of not less than six persons, including the defendant, and having similar vocal and linguistic characteristics, accents, diction, pronunciation and grammatical usage to the defendant. The Winston-Salem Police Department is hereby ordered to prepare and conduct any live or recorded auditory line-ups and procedures as may be necessary. Each witness shall be asked to identify the defendant utilizing only the standard Winston-Salem Police Department line-up instructions, as modified to reflect an auditory rather than visual identification, and such instructions shall be read to each witness in the presence of defense counsel.**
- I. At the option of the State and with the agreement of the defendant's attorney a recorded tape line-up may be substituted for an actual physical line-up. Such auditory recording line-up shall follow the conditions set forth herein, and each actual auditory line-up utilized, along with the results of each such use of the line-up, shall be filed with the Court as of record. The Winston-Salem Police Department is further ordered to ensure that any auditory recording of the defendant utilized in said auditory line-up is that recording created as close to the alleged date of offense of August 4 to August 19, 2004 as is available. Any voice sample or line-up previously shown by detectives to the witnesses, if any, shall not be used, and no voice line-up shall be used more than once. If defense counsel objects to the utilization of a particular voice line-up, and the parties are not able to agree on any corrected voice line-up, such voice line-up shall not be used without a prior ruling by the Court authorizing the use of that voice line-up.**
- J. The identifying and descriptive information, such as name, race, and voice style, tone, and manner of the persons and the relative positions of the persons**

**contained in the voice sample line-up shall be recorded in written format and filed with the Court.**

**K. The identification or lack of identification by any witness shall be recorded in written format and filed with the Court.**

**L. No witness shall be informed of the correct or incorrect identification made by the witness after the procedure has been conducted.**

It is so ordered this the \_\_\_\_ day of \_\_\_\_\_, 2005.

Nunc Pro Tunc, this the \_\_\_\_ day of \_\_\_\_\_, 2005.

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District Court Judge Presiding