

CHAPTER 14

PRE-TRIAL IDENTIFICATION PROCEDURE

GOAL

To properly identify those persons involved in criminal activity by a procedure that is reliable and not suggestive or likely to lead to a mistaken identification.

PROCEDURE

Particular procedures are required for different types of identifications depending upon the time they occur investigation or trial process. Officers must be aware of what procedures are required at different times.

DISCUSSION

Different rules are applied to pre-trial identification procedures depending on whether a one-to-one show up, a photo identification, or a line up identification procedure is used.

The theory involved with the one-to-one show up identification is that a suspect may be detained at the scene of a stop within a short time of the crime. Courts have noted that presenting one suspect to a victim or witness creates a danger of false identification as the show up may be suggestive, (i.e. the witness is made aware of the fact that this is the person that the police suspect of committing the crime). This suggestiveness is accepted by the courts based on the rationale that on-the-scene show ups allow the police to quickly confirm their suspicions or determine if they have the wrong person. This prevents the detention of an innocent suspect and avoids diminishing the reliability of an identification made at a later line up procedure.

A photographic line up is essentially an array of photographs of suspect and several other similar persons for viewing by a witness or victim. To be as reliable as possible, there should be at least six photographs in the array. To further assure accuracy of the line-up, the physical characteristics of the persons in the photos (such as photograph background, gender, race, age, height, weight, hair color, glasses, hats, facial hair, etc...) should be similar, as to avoid suggestive identification.

The use of an in person line up identification is helpful in that subtle characteristics not always captured by a photograph are relayed when a witness or a victim makes a viewing of a suspect "in person". The viewing of a suspect in person allows the witness or victim to also examine the array from a variety of perspectives not available through a photographic line up. This procedure, as with photographic line ups, should give due regard to the similarity of people in the

array, so the line up is not suggestive.

I. ON THE SCENE SHOW UPS

A. Probable Cause to Arrest

If a suspect is apprehended within a short time of a crime, the best practice would be to detain the arrestee where the arrest has occurred, and transport the victim or witness to the scene for identification. As probable cause for arrest exist, the identification is a type of evidentiary gathering procedure. Should it be impractical to transport the victim or witness to the arrest scene within a short period of time, a photographic line up should be utilized for the identification.

EXAMPLE:

An officer receives a complaint of an armed robbery having just occurred. While traveling to the scene the officer observes a person matching the description of the suspect who is a short distance from where the crime occurred. Upon stopping the suspect, the officers develops probable cause to arrest the person for commission of the armed robbery.

The witness or victim should be transported to the scene of the arrest for a show up identification within a reasonable period of time. If it is not possible to transport the witness or victim, the officer may use the arrest photograph for a photograph line-up, or apply for a non-testimonial court order to obtain a photograph.

B. Reasonable Suspicion to Detain

Some courts have ruled that if probable cause to arrest does not exist to arrest a suspect, a suspect may not be transported to the scene of a crime of a "Terry" stop. The Vermont Supreme Court has not yet ruled on this issue, but in anticipation of an adverse ruling, if the circumstances allow, the officer may consider transporting the victim to the place where the suspect has been detained rather than transporting the suspect to the victim.

EXAMPLE:

An officer receives a complaint of an armed robbery having just occurred. While traveling to the scene the officer observes a person matching the description of the suspect who is a short distance from where the crime occurred. The officer has insufficient evidence to establish probable cause to arrest the suspect, but does have the authority to detain the suspect based on a "Terry" stop, reasonable suspicion rationale. If circumstances allow, the officer should transport the victim to the place where the suspect is being detained to determine if an identification can be made.

If other personnel are not available, or other circumstances exist which prevent transport of the

victim, the officer may attempt to obtain consent from the suspect to allow for the transport of the suspect to the victim's location.

In the event the suspect will not consent to being transported to the location of the victim, the officer may apply for a nontestimonial court order to obtain a photograph to be used later in a photographic line up.

C. Emergency Identification

When there is a genuine emergency, for example when a witness is believed to be dying, courts have also relaxed the ban on "one-on-one" identifications and have allowed such identifications when necessary to prevent the loss of vital evidence. In such situations an officer should attempt to contact the State Attorney and consult with the prosecutor if at all possible. If the State Attorney can not be contacted, and a risk exists that identification evidence will be lost if a show up is not conducted immediately, then the officer should proceed with the identification taking careful notes of all the surrounding circumstances.

II. PHOTOGRAPH IDENTIFICATION

An officer may show a selection of photographs to a witness in order to determine if the witness can identify a suspect. A suspect does not have the right to presence of counsel during a photographic identification even if the suspect has retained a lawyer or has already been charged with a crime.

Courts are also concerned that the photographic identifications not be "unduly suggestive". When conducting a photographic identification, the following rules should be followed:

1. Multiple photographs should be shown to a witness. Six photographs should be used.
2. The people appearing in the photographs should be of the same general age, racial and physical characteristics; the backgrounds of the photographs should be the same.
3. No group of photographs should be arranged in such a way that the photograph of a single person reoccurs or is in any way emphasized.
4. The law enforcement officer should not indicate to the witness that they have other evidence that one of the persons pictured committed the crime.
5. If more than one person is to view the photographic line up, the witnesses should be separated and should not discuss amongst themselves any facet of their views of the photographs or the results of their conclusions before all the witnesses have made their identification.
6. All witnesses who are to view the photographs should be prevented from seeing the suspect in custody.

7. After the photographs have been shown to the witness, they should be numbered and preserved as evidence.

III. LINE UP IDENTIFICATION

Pursuant to V.R.Cr.P rule 41.1, an officer or State Attorney may request the court to issue an order for a line up. The officer need only show "reasonable grounds" to believe the person committed the offense. An application for a nontestimonial court order must be accompanied by an affidavit establishing that (1) there is probable cause to believe an offense has been committed, (2) there is reasonable grounds to suspect the subject, and (3) the results of the test will be a material aid in establishing whether or not the subject committed the crime. A request for a line up order may be made prior to the arrest, after arrest and prior to trial, or under special circumstances, during a trial. Additionally, if a danger exists that after being served such an order, the suspect may either flee the area or change her appearance, etc the officer may establish this fact in the affidavit and the judge may order that the person be brought before the judicial officer and the line up will be conducted immediately. An officer should always go to the State Attorney office when filing this order, as the State Attorney must authorize the officer to make the application for a line up order.

A. Line up Identification Procedure

Although Rule 41.1 sets up a mechanism for a court ordered line up, it does not require this procedure to be used. In some situations, such as when a person is not in custody, a person may consent to participating in a line up. In such a case, the officer should have the participant sign a consent or waiver form.

1. Insofar as possible, all persons in the line up should be of the same general weight, height, age, physical characteristics, and clothing.
2. Should any body gestures or verbal statements be necessary, this should be done uniformly and any such movement, gesture, or statement be done one time by each person participating in the line up, and repeated only at the express request of the person attempting to make the identification.
3. A color photograph of the line up should be taken and developed as soon as possible.
4. If more than one person is called to view a line up, persons called should be segregated from one another, and should not be allowed to discuss among themselves any facet of their view of the line up or the result of their conclusion
5. All witnesses who are to view a line up should be prevented from seeing the suspect in custody and in particular handcuffs, or in any manner that would indicate to the witness the

identity of the suspect.

6. All efforts should be made to prevent a witness from viewing any photographs or the suspect prior to giving the line up.
7. All conversation between the police officer and prospective witnesses should be restricted to only indispensable direction. In all cases nothing should be said to the witness to suggest the suspect is standing in the particular line up.
8. Should there be more than one witness, only one witness at a time should be present in the room where the line up is conducted.

B. Right to an Attorney

After formal charges have been made against the subject she is entitled to an attorney before a line up is conducted. Even though the right counsel exists, this does not mean that the suspect has the right to refuse to participate in a line up as ordered by the court. The right is only to have counsel present to assure the line up is conducted fairly. A suspect's failure to obey an order for a line up is punishable as contempt of court.

NONTESTIMONIAL IDENTIFICATION PROCEDURES

GOAL

To facilitate the lawful collection of nontestimonial evidence particular to a person, for the purposes of determining whether or not a person committed a criminal offense.

PROCEDURE

The familiarization of law enforcement officers with those procedures outlined in V.R.Cr.P. 41.1, Nontestimonial Court Orders, so that evidence may be lawfully collected.

DISCUSSION

The need for officers to collect evidence for use in criminal investigations is vital in that it may be used to either eliminate persons from suspicion, or to determine involvement and culpability.

Nontestimonial evidence is particular to the person, and may be used for comparison purposes with transfer evidence left at the scene of a crime. Among the types of test that are authorized

under V.R Cr. P. 41.1 are: fingerprints, palm prints, foot prints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examination, handwriting examples, voice samples, photographs, or lineups.

The primary difference between searches conducted pursuant to a search warrant and those by nontestimonial court orders is the area to be searched, and the level of proof required to meet the rule requirement. V.R.Cr.P. 41 for search warrants allows areas to be searched when there is probable cause to believe the evidence sought in a crime will be in a specific location. Nontestimonial court orders only require reasonable suspicion that a person may have committed a specific offense.

I. ISSUANCE

Nontestimonial Orders may be issued by a Judicial Officer on the request of either the State Attorney or a Police Officer. Application for the order must be accompanied by an affidavit that demonstrates, (1) probable cause to believe an offense has occurred, (2) that there are reasonable grounds, that need not amount to probable cause to arrest, to suspect the person committed the offense, and (3) the results of the specific nontestimonial identification procedures will be of material aide in determining whether the person named committed the offense.

While "reasonable grounds" are the general standard to suspect a person of an offense for most nontestimonial identification procedures, it is important to note that the Vermont Supreme Court has directed when a procedure involving the collection of pubic hair is to be used, there must be probable cause to suspect the person committed the offense.

V.R.Cr.P 41.1 defines an "offense" as an offense triable in any court and being punishable by imprisonment for more than one year. This is significant in that an officer may be investigating a misdemeanor punishable by less than one year, may have reasonable grounds to suspect a person committed the act, but would be unable to utilize a nontestimonial order to gather standards from a person for testing.

II. CONTENTS OF THE ORDER

The order shall be signed by the judicial officer and must state:

1. that the person named in the affidavit is required for the purpose of permitting the named identification procedure;
2. the time and place of the required appearance;

3. the nontestimonial identification procedure to be used, the method, and the length of time required for completion;
4. the grounds to suspect the person named in the affidavit committed the specific offense;
5. that the person will be under no legal obligation to submit to any interrogation or to make any statements during the period of the appearance, except for voice identification;
6. that the person may request the judicial officer to make a reasonable modification of the order with respect to time and place of appearance, including a request to have any nontestimonial identification procedure other than a line up conducted at his place of residence;
7. that the person, if he fails to appear, may be held in contempt of court.

III. SERVICE OF THE ORDER

The nontestimonial order shall be served anywhere in the State of Vermont on the suspect by a Vermont law enforcement officer. An exception to the service requirement is when a suspect may be deemed a delinquent child as defined in title 33 VSA (whether the child is ultimately charged as a juvenile or an adult), the suspect must have a guardian ad litem appointed prior to service of the order. In such a case, the order shall be served on the guardian ad litem, and shall be provided with a reasonable opportunity to consult with the child prior to the execution of the order.

In normal circumstances, the order shall be served with a minimum of three days to allow the suspect to request a modification of the order. In the event the suspect waives his or her right to contest the modification of the order and is cooperative, the suspect may comply with the nontestimonial order at the time of service, or anytime before the ordered date of appearance.

IV. IMPLEMENTATION OF THE ORDER

Evidence gathering may be conducted by any law enforcement officer; medical evidence to be collected from the suspect shall be obtained by medical personnel only. The Judicial officer may order medical supervision to any other test when he deems supervision is necessary.

After the collection of the nontestimonial evidence, the officer must make a return shall be made to the judicial officer within forty five days.

CHAPTER 15

DWI PROCEDURE

GOAL

To aggressively enforce driving while impaired statutes and reduce the harm caused by such violations.

PROCEDURE

Officers need to be constantly aware of the mannerisms of the motoring public, being alert to the presence of an impaired driver. The chronology to the processing of impaired drivers includes: reasonable suspicion to make the initial stop, observing the operator's mannerisms, make cursory inquiry as to the operator's consumption of alcohol and / or drugs, conduct standardized field sobriety test, decide whether to process

DISCUSSION

For an officer to bring a charge of DWI the officer must show that a subject was:

OPERATING, ATTEMPTING TO OPERATE, OR IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE ON A PUBLIC HIGHWAY WHILE:

- A. there is .08 per cent or more by weight of alcohol in his blood, as shown by analysis of his breath or blood; or
- B. under the influence of intoxicating liquor; or
- C. under the influence of any other drug or under the combined influence of alcohol and any other drugs to a degree which renders him incapable of driving safely.

I. DEFINITIONS

OPERATE, ATTEMPT TO OPERATE, OR IN ACTUAL PHYSICAL CONTROL is defined as covering all actions or situations connected with the presence and use of a motor vehicle on the highway, whether the vehicle is in motion or at rest. Actual physical control includes those situations where a suspect has the immediate potential to operate a motor vehicle. The Vermont Supreme Court has noted that an intoxicated person seated behind the steering wheel of a motor vehicle at rest is a threat to the safety and welfare of the public because such a