

[CAPTION]

MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The Defendant, by counsel, respectfully requests this Court to suppress any out-of-court identification of himself on [insert date], and any subsequent in-court identification. In support of the Motion, the Defendant states the following:

1. On or about [insert date], the police employed a "one-on-one show up" identification procedure, during which the complaining witness allegedly identified the Defendant as her perpetrator, which was so impermissibly suggestive and conducive to irreparable mistaken identification that the Defendant was denied due process of law. Because of this due process violation, evidence of the pretrial identification is inadmissible. It has long been recognized in the Indiana courts that a one-on-one show-up procedure is "necessarily inherently suggestive." Hubble v. State, 754 N.E.2d 884, 892 (Ind. 2001).
2. The conduct of the police officers present during the one-on-one show up was such as to improperly suggest the identification of the Defendant as the perpetrator of the offense. "The practice of showing suspects singularly to persons for the purposes of identification and not as part of a line-up, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967).
3. The alleged identification took place at a time when the Defendant was in the custody of law enforcement and a proper, more reliable witness-suspect confrontation was possible, i.e. a line-up or photo array. See Wethington v. State, 560 N.E.2d 496 (Ind. 1990)
4. Prior to the confrontation, the Defendant was not advised by the law enforcement officers that he had a right to have an attorney present during such confrontation. U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967) (establishes the right to counsel at pre-trial, post-indictment identification); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920) (unlike the federal Sixth Amendment right to counsel, the right to

counsel secured by Art. 1 §13 of the Indiana Constitution attaches at an earlier stage than indictment or information).

5. The Defendant was not represented by counsel nor was counsel present at the confrontation. Hatcher v. State, 414 N.E.2d 561 (Ind. 1981).
6. The identification of the Defendant at the confrontation was made in violation of his constitutional rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. 1, Section 13 of the Indiana Constitution.
7. Further, any in-court identification of the Defendant is inadmissible as there is a very substantial likelihood of irreparable misidentification based upon the following non-exclusive factors: the victim carried a picture of the Defendant's mugshot as it appeared in the newspaper for well over a year, the original show-up tainted the accuracy of the victim's memory, and because the victim now has had ample opportunity to view the Defendant in the original suppression hearing, jury trial, and at least five (5) more publications of his mugshot in the local newspaper.

WHEREFORE, the Defendant requests that this Court enter an Order suppressing:

- A. Any and all evidence relating to the pre-trial identification of the Defendant by witnesses who were involved in the improper pre-trial identification procedures; and
- B. Any in-court identification of the Defendant by witnesses who were involved in the improper pre-trial identification procedures inasmuch as such identification is the product of the improper pre-trial identification, unless the State shows by clear and convincing evidence that the in-court identification is not tainted and there is an independent source for the in-court identification.

(Signature)

REFERENCES

CASEBANK R.1; R.2; R.4; R.5; R.6

U.S. Constitution 14th Amendment

Ind. Constitution, Art. I Sections 12 and 13

See generally, Sobel, Nathan R., Eyewitness Identification, Legal and Practical Problems, 2d edition, Clark Boardman Callaghan.

CASE LAW

Bray v. State, 443 N.E.2d 310 (Ind. 1982) (overview of Indiana cases on lineups, photo displays and the admissibility of those items; witness should not be informed that suspect is in the lineup).

United States v. Miller, 795 F.3d 619, 628 (7th Cir. 2015) (“Defendants have a due process right not to be subject to unreasonably suggestive identification procedures that create a substantial likelihood of irreparable misidentification.”)

Hale v. State, 976 N.E.2d 119 (Ind.Ct.App. 2012) (due process requires the suppression of evidence when the procedure used during a pretrial identification is impermissibly suggestive).

RIGHT TO COUNSEL

Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) (right to counsel was violated by corporeal identification at a preliminary hearing without counsel; failure to exclude the evidence may be harmless; footnote 5 suggests ways to avoid suggestive in-court identification).

Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (Sixth Amendment requirement of counsel does not apply to pre-indictment show-ups, but only post-indictment show ups; prohibition against unnecessarily suggestive show-up applies to all show-ups).

Little v. State, 475 N.E.2d 677 (Ind. 1985) (holding that U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) explicitly qualified informal right to counsel to stages of prosecution and requires determination of substantial prejudice in pretrial confrontation and ability of counsel to avoid such prejudice; there is no right to counsel when reconstruction of the Defendant's lineup (names recorded, victims' taped interviews re lineup and photograph of lineup) is available and no prejudicial or suggestive factors in here in lineup).

Davenport v. State, 536 N.E.2d 263 (Ind. 1989) (identification evidence from uncounseled lineup held after the right to counsel has attached is improper absent valid, knowing waiver by the Defendant), overruled on other grounds by Seay v. State, 698 N.E.2d 732, 735 (Ind. 1998); see also Hatcher v. State, 414 N.E.2d 561 (Ind. 1981).

SHOW-UPS

Olson v. State, 563 N.E.2d 565 (Ind. 1990) (holding one-on-one confrontations, though inherently suggestive, are not per se improper).

Wethington v. State, 560 N.E.2d 496 (Ind. 1990) (show-ups between victims and suspects 2 hrs. after robbery, and again another hour later, with prominent display of weapons taken from suspects, were impermissibly suggestive; no exigent circumstances existed which precluded setting up properly

constituted lineup).

Hubbell v. State, 754 N.E.2d 884 (Ind. 2001) (a show up six hours after the confrontation was unduly suggestive; there were two witnesses at the show up who could influence one another).

Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969) (accused was first placed in lineup with considerably shorter men, and after no positive identification, was placed in one-to-one confrontation arranged with robbery victim; this procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be denial of due process).

Lyles v. State, 834 N.E.2d 1035 (Ind.Ct.App. 2005) (upholding show-up; while the show-up identification here two and a half hours after the crime "raises some concerns," Court determined similar identifications have been upheld in the past). See also Gray v. State, 563 N.E.2d 108 (Ind.1990) (upholding show-up that occurred within 15 to 30 minutes after robbery, and where Defendant was in handcuffs during identification); Adkins v. State, 703 N.E.2d 182 (Ind.Ct.App.1998) (upholding show-up that occurred 40 minutes after robbery where witness's descriptions matched Defendant and police only informed witness that they "thought they maybe" had a suspect).

Rasnick v. State, 2 N.E.3d 17 (Ind.Ct.App. 2013) (show-up identification of Defendant by two burglary victims that occurred within 30 minutes of crime was not unduly suggestive and thus did not violate due process; appellate courts review challenges to show-up identifications by examining the totality of the circumstances surrounding the identification, including: (1) the opportunity of the witness to view the offender at the time of the crime, (2) the witness's degree of attention while observing the offender, (3) the accuracy of witness's prior description of offender, (4) the level of certainty demonstrated by witness at identification, and (5) the length of time between the crime and the identification).

Gordon v. State, 981 N.E.2d 1215 (Ind.Ct.App. 2013) (show-up identification procedure used by police one hour after attempted break-in was not unduly suggestive where witness observed Defendant and Accomplice for several minutes, witness's attention was solely focused on Defendant and Accomplice during that time, and witness was absolutely certain that Defendant was person she had seen committing attempted break-in).

LINE-UPS

Long v. State, 385 N.E.2d 191 (Ind. 1979) (it was an improper lineup where there were only four people in lineup and those four were made to say their names and addresses when witness knew the Defendant's name).

Bray v. State, 443 N.E.2d 310 (Ind. 1982) (witness may not be informed that a suspect is present in the lineup).

PHOTO ARRAYS

Carter v. State, 361 N.E.2d 1208 (Ind. 1977) (photo display was unnecessarily suggestive where witness described man to police as having goatee and only the Defendant had goatee among those in photos displayed to witness).

J.Y. v. State, 816 N.E.2d 909 (Ind.Ct.App. 2004) (it was error to admit a detective's testimony regarding complaining witness's out-of-court identification of the Defendant because the photo array was impermissibly suggestive; the remarkable difference in appearance, including clothing, demeanor, and the difference in the quality and composition of the two sets of photographs, rendered the photo array

impermissibly suggestive; also the complaining witness could not identify the Defendant in Court, was unable to identify her assailants with any specificity and used the wrong name to identify a Co-Defendant).

Jackson v. State, 33 N.E.3d 1067 (Ind.Ct.App. 2015) (photo array not unduly suggestive where array contained jail intake photographs of five other individuals, while Defendant's photograph was one taken from Bureau of Motor Vehicles; each photograph was of sufficient clarity to allow examination of facial features).

IN-COURT IDENTIFICATION

Marsh v. State, 480 N.E.2d 927 (Ind. 1985) (although the identification procedure was so suggestive that any identification resulting from it should have been inadmissible, an independent basis existed for the in-Court identification; here, the witness knew the Defendant's name, identified him after the Defendant's name was called and the Defendant appeared at arraignment on second robbery of same restaurant; the court looks to the totality of the circumstances to determine if an independent basis exists). See also Wrencher v. State, 635 N.E.2d 1095 (Ind. 1994).

Carter v. State, 361 N.E.2d 1208 (Ind. 1977) (photo display was unnecessarily suggestive where witness described man to police as having goatee and only the Defendant had goatee among those in photos displayed to witness; however, the trial court did not err in permitting the witness to make in-court identification of the Defendant since she had seen the Defendant at least twice prior to crime and had good opportunity to observe him during the crime).

Hyppolite v. State, 774 N.E.2d 584 (Ind.Ct.App. 2002) (although another police officer brought single photograph to officer-witness for identification, officer's in-court identification was independently supported).

Smith v. State, 553 N.E.2d 832 (Ind. 1990) (a victim's in-court identification of the Defendant was proper, even though the victim was shown a single photo of the Defendant by someone who told the victim that it was a photo of the Defendant; the fact that the witness had ample opportunity to observe the Defendant during the robbery was an independent basis for the in-court identification).

Merrifield v. State, 400 N.E.2d 146 (Ind. 1980) (where rape victim made in-court identification of the Defendant without objection, any issue concerning possible taint on this in-court identification as a result of the police's hypnotizing victim several days after incident was waived).

Pemberton v. State, 560 N.E.2d 524 (Ind. 1990) (there may not have been an independent basis for the in-court identification of the Defendant, and failure to make a trial objection to the in-court identification and testimony regarding the pre-trial show-ups was found to be ineffective assistance of counsel).

Lee v. Foster, 750 F.3d 687 (7th Cir. 2014) (neither witness's in-court identification of Defendant nor the out-of-court photo array where witness was unable to identify Defendant were unduly suggestive).

United States v. Miller, 795 F.3d 619 (7th Cir. 2015) (mere fact that witness could not positively identify Defendant in pre-trial identification procedure did not automatically render that witness's subsequent in-court identification inadmissible).