

7/5/2001 N.Y.L.J. 20, (col. 5)

New York Law Journal  
Volume 226, Number 3  
© 2001 NLP IP Company

Thursday, July 5, 2001

Court Decisions  
First Judicial Department  
Supreme Court  
Bronx County  
Criminal Term, Part 49

PEOPLE V. **LEO FRANCO**

Justice Barrett

The People are about to conduct a lineup involving the defendant, to be viewed by one of their potential witnesses. In advance of this procedure the defendant asks this court to issue a judicial order directing the People to use "a double-blind sequential lineup procedure." For the reasons stated below, defendant's motion is denied.

Initially, it is important to define the critical terms applicable to a resolution of this motion. In a simultaneous lineup, the subject is displayed with four or five fillers in a single viewing by the potential identifying witness. In a sequential lineup, the participants are displayed one at a time to the identifying witness, with no lineup participants ever being viewed together. Moreover, in a double-blind lineup, the person administering the lineup is unaware of the identity of the alleged suspect, making it impossible for this lineup administrator inadvertently to convey to the identifying witness the identity of the actual subject.

In papers filed in support of this request for a sequential lineup, defendant has appended a number of articles authored by social scientists supporting the proposition that the use of sequential lineups is likely to result in fewer false identifications than the use of the more traditional simultaneous lineup. To the Court's knowledge, however, there exists no reliable legal or statutory authority for the proposition that the likelihood of a false identification in a simultaneous lineup is sufficiently substantial as to implicate due process rights. The authorities additionally opine that the percentage of correct identifications remains virtually constant irrespective of whether sequential or simultaneous lineups are used. That further suggests that simultaneous lineups are not patently unreliable, though it also demonstrates that law enforcement authorities have no compelling reason to insist on adherence to the traditional lineup.

Appended to the defense motion is a nine-page proposed order containing at least 55

specific directives as to how the sequential lineup should be conducted. Included among these directives are the specific roles and duties of the lineup "administrator" (the person who remains with the witness during the sequential lineup) and the lineup "conductor" (the person who remains with the individuals to be presented in the sequential lineup during the entire process). Also included in this proposed order are: the language that the administrator must use in instructing the lineup witness; the questions from the witness that the administrator may respond to and what his/her response should be; the manner in which the sequential lineup should be conducted (in great detail); the information that must be recorded and kept regarding the lineup (by both the recorder and the administrator); and the requirement that this sequential lineup procedure must be documented by "photo or video." (The above is merely illustrative of the details that are included in the defendant's nine-page proposed order.)

A defendant in a criminal prosecution has no constitutional right to demand to be placed in a lineup; moreover, if the authorities choose to conduct a pretrial identification procedure, the suspect has no constitutional right to demand that the procedure be a corporeal lineup. *People v. Ruiz*, 52 NY2d 929, 930 (1981). Nonetheless, a lineup is recognized as the preferred method of identification. *People v. Adams*, 53 NY2d 241, 249 (1981). A lineup significantly reduces the likelihood of suggestiveness when compared to other forms of identification, particularly as to showups involving a single suspect, and as such, it is good police and prosecutorial practice to utilize lineups whenever practicable. Still, a defendant who has been placed in a show-up, rather than a lineup, may be heard to claim not that a lineup was required but that the show-up conducted was unconstitutional. This recognizes the appropriate distinction between the judicial function and the police/prosecutorial function, whereby the courts may not dictate management operations nor intrude upon prerogatives, but may measure whether those procedures utilized satisfy constitutional standards.

In the context of reviewing a pretrial identification procedure, it is the duty of the court to insure that the procedure employed was not unnecessarily suggestive. In making this assessment, courts traditionally consider such factors as the composition of the lineup vis-a-vis the identifying witnesses--' description of the perpetrator, the manner in which the lineup was conducted, and any external influences (e.g., suggestive remarks) that may have influenced the outcome of the procedure (see generally, *Hibel*, New York Identification Law (2001), pps. 168-172). Commensurate with a careful consideration of the factors outlined above, this Court will, of course, assess all aspects of any identification procedure conducted in this case to assure that the lineup held was not unnecessarily suggestive. However, this Court declines to order the People to conduct a sequential lineup, and is particularly reluctant to endorse an order that specifies in painstaking detail the specific procedures that must be employed in the implementation of this sequential lineup.

In *Illinois v. Lafayette*, 462 US 640 (1983), the Supreme Court provided guidance on an issue which closely mirrors the question before this court. The Court was asked to intervene in the manner by which the Illinois police chose to conduct inventory searches, an issue with broad Fourth Amendment implications. In refusing to consider and evaluate potential alternative means by which the Illinois police might conduct inventory searches, and in declining to order the Illinois police to alter the methods they used in conducting such searches, the Supreme Court outlined the judiciary's role regarding intervention in

police procedures:

... The real question is not what "could have been achieved" but whether the Fourth Amendment requires such steps; it is not our function to write a manual on administering routine, neutral procedures of the station house. Our role is to assure against violations of the Constitution.

The reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.

462 US at 647.

Even when an existing procedure is found to be constitutionally infirm, courts traditionally are reluctant to engage in the business of creating solutions or mandating procedures that would rectify the matter. Courts resist the invitation to legislate, therefore, even when existing procedures are demonstrably unconstitutional, though of course there is no reluctance to strike down these police or prosecutorial actions and to grant appropriate relief to an aggrieved party. Defendant's application for judicial legislation here, *a fortiori*, cannot be granted, where the claim is not that the simultaneous lineup is unconstitutional *per se*, but only that the sequential lineup may be an improvement over the simultaneous lineup as theorized by the social scientists. [FN1] Thus, with these precepts as a guide, this Court declines to engage in a process of determining whether there exists a potentially "better method" of conducting a lineup, nor will it involve itself in assessing and recommending the fine details of how such a lineup must be conducted. Rather, this Court will carefully assess the manner in which any lineup is conducted to "assure against violations of the Constitution" (*Illinois v. Lafayette*, *supra*). Defendant's motion to compel by court order a sequential lineup in place of a simultaneous lineup is denied.

The Court's rejection of the application for an order directing law enforcement authorities to adopt sequential lineups and to cease simultaneous lineups should not be read, particularly by those in law enforcement who establish lineup policies, as an endorsement of simultaneous lineups or as a rejection of the social studies favoring sequential lineups counsel has so diligently researched and presented. The Court, rather, declines the invitation to perform the legislative or administrative function of prospectively formulating the specific procedures governing law enforcement operations, on the sole ground that this is not an appropriate exercise of the judicial power. But this decision does not represent a finding that sequential lineups and simultaneous lineups are, from the perspective of accuracy and fairness, equivalent. Nor does the Court hold that their distinctions will be deemed irrelevant in the judicial evaluation of the identification procedures actually utilized, for this decision does not represent a general validation of the simultaneous lineup in every instance. The materials examined by the Court suggest that the defense has identified an identification procedure that may improve upon the traditional lineup by reducing "incorrect" identifications without any offsetting detriment to law enforcement objectives *i.e.*, the studies suggest that the number of "correct" identifications would be identical respecting both types of lineups. Much as the traditional lineup was created not by the courts but by law enforcement authorities to address perceived suggestiveness problems with the single suspect corporeal viewing, sequential lineups might well be studied by police and prosecutorial bodies with the objective of enhancing the accuracy and fairness of these very significant pretrial identification procedures. This would be a suggestion, however, not a judicial order.

Finally, the defense has requested a Frye hearing at which the purported advantages of the sequential lineup can be proven and the general acceptance in the scientific community can be established. A Frye hearing does not antecede the type of judicial order that the defense has sought and that this Court has declined to issue; instead, it addresses the expressly judicial domain of whether to allow expert testimony at a court proceeding with respect to a proposed issue. Insofar as the putative superiority of the sequential lineup might imply a deficiency in a particular simultaneous lineup, in an appropriate case the defense could challenge as suggestive the simultaneous lineup employed on the very grounds advanced by the advocates of the sequential lineup. This contention might well entail the presentation of expert testimony. It would be premature, however, to decide that this would be warranted in the case at bar, as no lineup has yet been conducted and no identification made. However, in the event that issue is properly joined here, the Court reserves decision as to whether to conduct a Frye hearing and whether to receive expert testimony regarding sequential lineups at a Wade hearing and/or trial.

This opinion constitutes the decision and order of this court.

FN(1) While defendant's motion cites to various papers by social scientists which suggest that a sequential lineup is less likely to result in a false identification, he cites to absolutely no legal or legislative authority in this or any other jurisdiction which mandates the use of sequential lineup. Indeed, a United States Department of Justice report entitled Eyewitness Evidence. A guide for Law Enforcement (1999) (cited by both defendant and the People), recommends either simultaneous or sequential lineups as being constitutionally appropriate methods of having a witness attempt to identify a suspect.

7/5/2001 NYLJ 20, (col. 5)