

35 Misc.3d 324

County Court, Monroe County, New York.

The PEOPLE of the State of New York

v.

Raymond FLOWERS, Defendant.

Jan. 20, 2012.

Synopsis

Background: People moved, by way of order to show cause, for order compelling appearance in corporeal lineup by defendant whose indictment was pending. Defendant opposed based on alleged lack of jurisdiction and failure to satisfy standards for safe and reliable intrusion into or onto defendant's body, and alternatively requested certain disclosure and particular kind of lineup.

Holdings: The County Court, Monroe County, [John L. Demarco, J.](#), held that

[1] absence of accusatory instrument did not prohibit order compelling lineup;

[2] safe and reliable requirement for physical intrusion does not include reliable identification testimony; and

[3] defendant was required to appear for lineup upon specified conditions.

Motion granted.

West Headnotes (5)

[1] Criminal Law

🔑 [Lineup procedure in general](#)

County court in which indictment against defendant was pending had discretionary authority to issue order requested by People compelling defendant to appear in corporeal lineup before filing of accusatory instrument, under statute governing discovery under court order, since People's request was not type of "fishing expedition" that statute's

jurisdictional limitations were likely designed to prevent. [McKinney's CPL § 240.40\(2\)](#).

[1 Cases that cite this headnote](#)

[2] Searches and Seizures

🔑 [Scope, Conduct, and Duration of Warrantless Search](#)

Under Fourth Amendment analysis, physical intrusions into or onto a suspect's body, which must be accomplished by a safe and reliable method that imposes no more physical discomfort than reasonably necessary, are required to be physically safe. [U.S.C.A. Const.Amend. 4](#).

[Cases that cite this headnote](#)

[3] Searches and Seizures

🔑 [Samples and tests;identification procedures](#)

Under Fourth Amendment analysis, the requirement that physical intrusions into or onto a suspect's body must be accomplished by a safe and reliable method, that imposes no more physical discomfort than reasonably necessary, does not include the concept of reliable identification testimony. [U.S.C.A. Const.Amend. 4](#).

[Cases that cite this headnote](#)

[4] Criminal Law

🔑 [Lineup procedure in general](#)

County court has the authority to establish conditions for a lineup that are designed to promote fairness and accuracy, indeed, to enhance the chances that reliable, relevant, material evidence will be gathered through the lineup procedure. [McKinney's CPL § 240.40\(2\)](#).

[Cases that cite this headnote](#)

[5] Criminal Law

🔑 [Lineup procedure in general](#)

[Criminal Law](#)

🔑 Assistance of counsel; advice and warnings

Defendant whose indictment was pending was required to participate in lineup, upon conditions that lineup would be double-blind and sequential, that defense lawyer and her investigator were permitted to attend and observe lineup, and that lineup procedure would be recorded in fashion enabling review for fairness. [McKinney's CPL § 240.40\(2\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

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[Dianne C. Russell](#), Esq., Rochester, for Defendant.

Opinion

[JOHN L. DEMARCO](#), J.

***325** The People have moved, by way of an Order to Show Cause, for an order compelling defendant to appear in a corporeal lineup. Defendant has opposed, contending principally that (1) the Court lacks jurisdiction to grant the relief requested under CPL Article 240, and (2) the People have failed to satisfy the so-called “*Abe A.*” standards, especially the safe and reliable intrusion requirement (see [Matter of Abe A.](#), 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265 [1982]). In the alternative, defendant requests, inter alia, certain disclosure and a particular kind of lineup.

[1] Although the Court agrees with defendant that [People v. Shields](#), 155 A.D.2d 978, 547 N.Y.S.2d 783 [4th Dept. 1989] does not explicitly hold that the Court has jurisdiction to order a lineup in the absence of a filed accusatory instrument of some kind, defendant points to no case, nor has the Court found one, that *prohibits* the issuance of such an order in the absence of an accusatory instrument. Furthermore, the Court notes that [CPL 240.40\(2\)](#) appears to grant jurisdiction to a court in which *an* indictment against the defendant is pending, and such is the circumstance here, albeit the lineup requested would seem to have nothing to do with

the indictment pending before the Court. More pertinent is the provision of [240.40\(2\)](#) ****578** that gives a court the power to order a lineup “before the filing of an accusatory instrument.” For these reasons, and because the Court finds that the People's request here is not the type of “fishing expedition” the ***326** jurisdictional limitations set forth in [240.40](#) were likely designed to prevent, the Court finds that it does have the discretionary authority to grant the relief requested here.

As to whether the requested relief should be granted, the Court finds that the three prongs of *Abe A.* have been met, for the reasons set forth in the People's papers and during oral argument of the application. Thus the Court will grant the People's request for a corporeal lineup. However, as defendant has argued vigorously that the safe and reliable requirement of *Abe A.* has not been met, the Court will discuss briefly why it respectfully disagrees with defendant's analysis.

The parties do not dispute that *Abe A.* held, in the context of a forced blood draw, that “the method by which the authorized intrusion is to be accomplished must be safe, reliable and impose no more physical discomfort than is reasonably necessary” ([Matter of Abe A.](#), 56 N.Y.2d at 297–298, 452 N.Y.S.2d 6, 437 N.E.2d 265). Interestingly, the four cases cited by *Abe A.* for this proposition all involved physical intrusions into a suspect's body. [United States v. Crowder](#), 543 F.2d 312 [D.C.Cir.1976] involved the forced surgical removal of a bullet from a suspect's arm. [People v. Scott](#), 21 Cal.3d 284, 145 Cal.Rptr. 876, 578 P.2d 123 [Sup. Ct. 1978] involved a forced medical test for trichomoniasis. [Rochin v. California](#), 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 [1952] involved forced vomiting and stomach-pumping. And [Schmerber v. California](#), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 [1966] involved a blood draw by a physician.

[2] Furthermore, the safe and reliable requirement of *Abe A.* has consistently been parsed by courts to require that physical intrusions into or onto a suspect's body be *physically safe* (see, e.g., [People v. Howard](#), 28 Misc.3d 1209[A], 2010 WL 2794065 [N.Y.Sup.2010] [safe and reliable means “free from unreasonable intrusion or risk of serious physical injury”]; [People v. Beecham](#), 25 Misc.3d 1214[A], 2009 WL 3321435 [N.Y.Sup.2009] [buccal swab]; [People v. Hammonds](#), 1 Misc.3d 880, 768 N.Y.S.2d 166 [N.Y.Sup.2003] [blood draw]; [People v. Alcime](#), 2002 WL 264371 [same]).

[3] In sum, the Court finds that defendant's reading of the safe and reliable prong of *Abe A.* to include the concept of reliable identification testimony is creative, but not supported by case law or Fourth Amendment analysis.

As to defendant's concern that his only remedy, if the witness picks him out of a lineup, "is to challenge the identification through cross-examination," the Court respectfully disagrees. Under the circumstances of this case, where the witness may *327 have viewed a single media photograph of the defendant numerous times before identifying (perhaps) that same photograph in a photo array, now to be followed by a potential identification of defendant in a corporeal lineup, defendant's use of an expert witness at trial may be warranted (see *People v. Abney*, 13 N.Y.3d 251, 889 N.Y.S.2d 890, 918 N.E.2d 486 [2009]; see also *People v. Julian Byrd* [Monroe County Court Indictment 0688/2009, DeMarco, J.]).

[4] [5] The Court does find convincing defendant's arguments with respect to the nature of the identification procedure that should be conducted. First, it is clear that the Court has the authority to establish conditions for a lineup that are designed to promote fairness and accuracy—indeed, to **579 enhance the chances that reliable, relevant, material evidence will be gathered through the lineup procedure (see generally *Ladd v. Stevenson*, 112 N.Y. 325, 19 N.E. 842 [1889] [a court has the inherent authority to control the content of its own orders]; see also *People v. Wilson*, 191 Misc.2d 224, 741 N.Y.S.2d 831 [Sup. Ct. Kings Co. 2002] [motion court has authority to order double-blind lineup]; *In re Investigation of Thomas*, 189 Misc.2d 487, 733 N.Y.S.2d 591 [Sup. Ct. Kings Co. 2001] [motion court has authority to order sequential, double-blind lineup]). Second, after considering the facts and circumstances of this case, the relevant case law, the oral argument on the application, as well as

pertinent scientific and academic literature on eyewitness identification procedures, the Court grants the People's request for a lineup, and hereby orders that defendant participate in that lineup upon the following conditions:

1. That the lineup be "double-blind," i.e., that neither the administrators of the lineup nor the witness shall know or be told before, during or after the lineup that the defendant is the suspect;
2. That the lineup be "sequential," i.e., that each participant be presented to the witness individually by the lineup administrator, and that the witness be allowed as much time as she requests to view each individual;
3. That defendant's lawyer and her investigator be permitted to attend and observe the lineup, and to be present during any pre-lineup instructions to the witness, as well as be present to observe and listen to the witness during the conduct of the lineup itself, including her words, if any, with respect to any identification or non-identification; and,
4. That the lineup procedure be recorded—electronically, photographically or otherwise—in a fashion that will enable the Court to review the procedure for fairness should a hearing be later requested and ordered.

*328 Of course the People are free to employ any other practices or procedures, in addition to the above, that they deem necessary to comply with fairness, due process, and the right to counsel in this matter.

SO ORDERED.

All Citations

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