

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PA**

**vs.**

**JESS KECK,**

**Defendant**

**:**

**: No. MD-5-2012**

**:OTN: T 259054-5; S 055142-3**

**:**

**: Petition for a Pre-Preliminary Hearing Line-Up**

**OPINION AND ORDER**

Before the Court is Defendant's Petition for a Pre-Preliminary hearing Line-Up.

Defendant is charged under two separate Criminal Complaints with Robbery and related crimes. Specifically on October 7, 2012, October 10, 2012, October 12, 2012 and October 14, 2012, Defendant is alleged to have committed four separate robberies. On October 7, 2012, Defendant is alleged to have robbed the Nittany Mini Mart on East Third Street in Loyalsock. On October 10, 2012, Defendant is alleged to have robbed the Cigarette Outlet located on Lycoming Creek Road in Old Lycoming Township. On October 12, 2012, Defendant is alleged to have robbed the Uni-Mart located on West Fourth Street in Williamsport. On October 14, 2012, Defendant is alleged to have robbed the Smoker's Outlet on East Third Street in Williamsport.

With respect to the first incident, the actor was described as a white male in his late 20's, approximately 5'10" to 5'11", with a broad build. He wore a black hoodie with a hood pulled up over his head and down to his eyes. He wore tan cargo pants and black shoes. He carried a black fabric drawstring bag. He was described as wearing an "obvious costume mustache."

With respect to the second incident, the actor was described as a white male sporting a black colored beard and mustache with glasses. He wore a black coat, pants, sneakers and a baseball hat. He brandished a handgun and directed that the money be put in a

black fabric type bag. The actor's beard was described as being "full and thick" and his hair was described as being "bushy," sticking out of his baseball hat. He was estimated to be over 5'9" and "having a heavy build."

With respect to the third incident, the actor was described as a white male approximately 6'1" tall and weighing about 220 pounds. He was described as having a mustache that "appeared to be out of the ordinary or possibly fake or applied in some manner." He also carried a black bag which was used to carry money and lottery tickets taken from the store.

With respect to the last incident, the actor was described as a white male approximately 6' tall, weighing approximately 200 pounds with a broad chest. He also had a dark black colored beard, "presumed to be fake." He wore a black jacket, black baseball cap, dark cloth gloves and eyeglasses. He demanded that the money be placed in a "cloth/nylon small bag."

Following this robbery, the actor apparently left his cell phone at the store. He returned without any disguise claiming that he had accidentally left his cell phone in the store earlier when he purchased some cigarettes. He was identified as Defendant Jess Keck.

When Defendant was being placed in the patrol vehicle, numerous witnesses came forward and notified the police that he had been parked in a parking lot behind the Pizza Hut for several hours. He was observed outside of his vehicle dumping items into the Pizza Hut dumpster. He was observed holding a small black bag in one hand while throwing away a McDonald's bag.

The police searched the dumpster and found numerous items of evidentiary value including empty wax paper and plastic heroin bags, several scratched lottery tickets, a receipt for the Uni-Mart store on West Fourth Street, a bank deposit slip in the Defendant's name, a box/packing material for eyelash glue/adhesive and a McDonald's bag.

During Defendant's interview with the police, he allegedly admitted throwing away the McDonald's bag, acknowledged that he was a heroin addict, and admitted that the phone found at the scene belonged to him. He was also observed to have glue-type material/white flakes on his facial hair, chin and sideburn area "similar" to the adhesive found in the trash.

A search of the Defendant's vehicle pursuant to a warrant resulted in a black jacket, black hat, black gloves and a small black bag matching the description of what the actor used during the fourth robbery, being found. The victim of the fourth robbery identified these clothing items.

Defendant argues that he has a right to pretrial line-up because his identification is at issue and the identification of him by Commonwealth witnesses at the preliminary hearing would be highly suggestive and tainted.

In support of his position, Defendant relies on the Supreme Court decision in Commonwealth v. Sexton, 485 Pa. 17, 400 A 2d 1289 (1979). In Sexton, supra., the Court concluded that where the issue of identification is legitimately at issue, a timely request for a pretrial or prehearing identification procedure should be granted.

The Court noted in its reasoning that the purpose of permitting a line-up identification is to provide a setting that is less suggestive than the one-on-one confrontation

provided by an in-court identification. The Court recognized as well “the peculiar problems raised in identification testimony.” In approving past precedent, it noted the “well known” vagaries of eyewitness identification and the fact that “the annals of criminal law are rife with instances of mistaken identification.” 400 A.2d at 1293 (citations omitted).

The circumstances present in the Sexton case included the fact that the sole evidence connecting the defendant to the crime was his identification, the witness had knowledge of the defendant before the incident, the witness observed the actor briefly before and during the crime, the witness had no contact with the defendant between the arrest and the certification hearing, and the witness had not been presented with an opportunity of a photographic identification prior to the hearing confrontation. Id. at 1292.

Approximately ten years later, the Supreme Court again addressed the issue of a pre-hearing line-up in the case of Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246 (1988). In that case, the Supreme Court held that the lower court did not abuse its discretion in denying a line-up because the victim had known the defendant from the neighborhood for approximately ten years, had seen the defendant since the crime, had the opportunity to observe the defendant at close arrange and did in fact identify the defendant from a photographic array. 540 A.2d at 254.

The grant or denial of a request for a line-up is within the sound discretion of the trial court. Commonwealth v. Blassingale, 398 Pa. Super. 379, 581 A.2d 183, 190 (1990). A criminal defendant has no constitutional rights to a line-up. Id. citing Commonwealth v. Lark, 316 Pa. Super. 240, 462 A.2d 1329 (1983), aff’d, 505 Pa. 126, 477 A.2d 857 (1984).

The facts in this case present a unique problem. While there is certainly other evidence connecting Defendant to the crimes, the majority of that evidence deals with the fourth incident in which the victim clearly had an opportunity to see Defendant without any disguise.

As is clear in the case law, suggestive confrontations are disapproved. They increase the likelihood of misidentification. It is important to ameliorate the suggestiveness of a courtroom confrontation and ensure the reliability of the identification. This Court believes that under all of the circumstances a pretrial line-up with respect to the alleged victims in incidents 1, 2 and 3 is appropriate. First, it is clear to the Court that given the circumstances of the alleged robberies and including the fact that the actor's appearance was disguised, any in-court identification would not only be suggestive but would lack a strong indicia of reliability. There is no evidence that the victims were familiar with Defendant beforehand, no evidence that the victims had contact with Defendant since his arrest, no evidence that the victims previously identified Defendant through a photographic array or otherwise, and no evidence that the victims were familiar with Defendant's voice, mannerisms or criminal methods.

While the Court acknowledges that there is evidence connecting Defendant to the crimes, such evidence is circumstantial at best and it too is dependent to some extent on identification testimony that Defendant was the individual who was behind the Pizza Hut throwing items into the dumpster. It would appear to the Court to be extremely unfair and improperly suggestive to permit an identification of Defendant at the preliminary hearing without first providing Defendant an opportunity to a pre-preliminary hearing line-up.

**ORDER**

AND NOW, this \_\_\_\_ day of January 2013 following a hearing and argument, the Court **GRANTS** Defendant's Petition for a Line-Up with respect to Incident 1, 2 and 3. This line-up shall occur prior to the preliminary hearing. Prior to the line-up the Commonwealth and its agent are precluded from exhibiting Defendant or his photograph to any of the witnesses. If the parties dispute the line-up procedure or the participants in the line-up they may contact the Court for further instruction.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: DA (EL)  
PD (WM)  
Gary Weber, Esquire (Lycoming Reporter)  
Work File