

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 13-CR-663-MV

MATTHEW I. GROBSTEIN

Defendant.

DEFENDANT'S MOTION TO SUPPRESS

COMES NOW Defendant Matthew I. Grobstein, by and through counsel Peter Schoenburg and Marc M. Lowry, under the Fourth Amendment to the United States Constitution and Fed. R. Crim. P. 12(b), and moves this Court to suppress the following:

- A. All physical evidence DEA Agents seized from Mr. Grobstein on February 21, 2013 at the Greyhound bus station in Albuquerque, New Mexico.
- B. All statements Mr. Grobstein made to DEA Agents on February 21, 2013.
- C. All evidence obtained directly or indirectly as a result of the evidence illegally seized from, and statements made by, Mr. Grobstein.

Mr. Grobstein requests that this Court conduct an evidentiary hearing so that he can demonstrate the facts of these constitutionally impermissible searches.

I. FACTUAL BACKGROUND

A. Law enforcement officers searched the passengers' luggage during the bus's servicing without their permission.

On February 20, 2013, Mr. Grobstein boarded a Greyhound bus in California en route to New York, where he resides. The bus had a layover at the Greyhound bus station in

downtown Albuquerque, and arrived at approximately 9:15 p.m. the next day, February 21, 2013. Passengers were instructed to exit the bus during the layover, and that carry-on luggage should be left on board and would be secure during the bus's layover servicing.

After all the passengers exited the bus, and just before the bus left the passenger loading area for servicing at approximately 9:30 p.m.,¹ Drug Enforcement Administration Special Agent Jarrell Perry boarded the bus, now empty of all passengers but containing their carry-on baggage.



The bus driver pulled around and parked inside of the Greyhound “cleaning bay” approximately one block south of the station. While Greyhound employees began servicing the bus, Perry remained on the bus, empty of all of its passengers, for approximately ten minutes. At 9:40 p.m., Perry exited the bus and began looking through the bus's cargo bays underneath the passenger compartment.

¹ The surveillance cameras at Greyhound have the approximate time reflected in the frames; however, the time reflected for each camera appears to vary slightly from the correct time.



He began with the rear most lower cargo compartment and worked forward to the other bays. He first opened and leaned into the bay, appearing to move and manipulate the passengers' luggage from within the bay. Agent Perry continued to this for approximately two minutes.



Agent Perry next pulled a rolling luggage bag out of the cargo bay under the bus, placed it on the ground, and squeezed it forcefully with both hands pressing on each side of the bag. He then knelt next to the bag in order to more forcefully squeeze and feel the bag's content. Perry then proceeded to move to the other luggage bays in a similar process. Overall, after spending ten minutes inside of the bus outside the reach of Greyhound security cameras, Perry spent over 5 minutes on camera conducting exploratory squeezes and feeling of the passenger's bags inside and beside the bus's cargo bays. After completing his search of the cargo bays, Agent Perry retrieved what could have been a passenger list, and began comparing the bag's luggage tags to information on the list.

Roughly ten minutes later, Albuquerque Police Department Task Force Detective John Walsh, working in tandem with Perry that night, arrived in the cleaning bay with a flashlight. Detective Walsh retrieved a bag from one of the open cargo bays under the bus. Walsh proceeded to manipulate and squeeze the bag in the same manner as Perry had done. At one point, he also knelt down over the bag in order to apply more force to the bag. Walsh then returned the bag to the cargo bay and leaned into a neighboring cargo bay.



Several minutes later, after he finished rummaging through the cargo bays, Detective Walsh boarded the empty bus, the door closing behind him. Greyhound employees began washing the exterior of the bus with a hose. Detective Walsh remained on the bus for approximately two and one half minutes, until the employees finished washing the bus, at which point a Greyhound employee opened the bus door. Walsh then exited the bus and left the cleaning bay area. By that point Agent Perry had also left the cleaning bay area.



B. With information gathered during the cleaning bay searches, the officers pre-boarded the bus and waited for the owners of two specific bags.

Approximately an hour after the passengers exited the bus during the layover, Greyhound employees began the re-boarding process. Passengers formed a line outside of the bus; Mr. Grobstein was roughly three-quarters of the way back in that line. When Mr. Grobstein stepped onto the bus, he immediately saw Detective Walsh searching an African American fellow passenger's² pillow near the front of the bus. The pillow appeared to have some sort of gel insert, and Mr. Grobstein overheard Detective Walsh asking the pillow's owner for more information regarding the insert.

After witnessing what appeared to be the start of a drug interdiction, Mr. Grobstein looked back toward his seat and saw Agent Perry standing in the middle of aisle directly next to his seat. Perry was clearly waiting for the passenger who had been sitting in that seat prior to the layover. Mr. Grobstein walked back to his seat and attempted to sit down. Before he could sit down, Agent Perry stopped Mr. Grobstein, informed Mr. Grobstein that he was an officer, and pulled aside his jacket to reveal his badge and handcuffs. Agent Perry briefly asked Mr. Grobstein about his travel plans, and then asked Mr. Grobstein which bag belonged to him.

² Both parties know the African American passenger's identity; in fact, his police report and state charges are public record. However, given the Court's Order (Doc. 40), the passenger is not named here.

This passenger was ultimately arrested for possession of 10 pounds of marijuana. Not surprisingly, given the apparent "sneak and peak" preliminary searches of the passengers' bags, only Mr. Grobstein and this passenger had their bags searched, in both cases drugs allegedly "found," and both were arrested.

Mr. Grobstein gestured toward his bag, which was sitting in the vacant seat next to his own, and Agent Perry asked to search it. Mr. Grobstein responded that he did not want Agent Perry to search his bag. He explained to Perry that in the past, officers had “messed up” his belongings while searching through his luggage. Agent Perry became noticeably agitated by Mr. Grobstein’s refusal, and said that officers do not mess up passengers’ belongings and that he had “never” done so in the past. In spite of Mr. Grobstein’s unequivocal refusal, Agent Perry would not take “no” for an answer. Agent Perry again asked to search the bag, and Mr. Grobstein again refused.

A determined Agent Perry, un-phased by the repeated refusals, then flatly told Mr. Grobstein, “let me search your bag.” Mr. Grobstein was aware of Detective Walsh’s aggressive questioning and painstaking search of the African American passenger’s carry-on belongings near the front of the bus. The agents had focused on these two passengers only; no other passengers on the bus were searched. It was clear to Mr. Grobstein that the two of them had been targeted and that refusal was not an option. Realizing that Agent Perry would not take “no” for an answer and feeling trapped and worn down after his multiple refusals, Mr. Grobstein equivocally responded “I’d prefer if you didn’t . . . but I suppose” Mr. Grobstein then opened his bag and removed a jacket from the top of his belongings. Agent Perry, who may have glanced at the contents of the bag, or even briefly thumbed through its contents, was clearly only interested in the jacket all along. He immediately asked Mr. Grobstein to see the jacket.

Upon receiving the jacket, Perry immediately began to palpate the jacket’s lining, and laid it over the back of a seat presumably to test the lining’s flexibility. Perry was quick to articulate his suspicion that something was within the jacket’s lining, and continued to

examine the jacket, asking Mr. Grobstein questions regarding the interior lining. Perry ultimately placed Mr. Grobstein under arrest. A substance allegedly testing positive for methamphetamine was ultimately discovered within the jacket. At several points during Mr. Grobstein's encounter with Perry, he noticed Perry fumbling with something in his pocket which appeared to be an audio recording device. Mr. Grobstein's counsel was later informed that there was no recording, not even a partial or inaudible recording, of the encounter.

II. ARGUMENT

The events leading to Mr. Grobstein's arrest on February 21, 2013 were the result of a calculated, unconstitutional, and seemingly routine practice of the involved law enforcement agencies at the Greyhound bus station. In a case very similar to the present, the Tenth Circuit articulated the nature of this style of interdiction:

When the bus arrived at the terminal, the detectives did not have probable cause to believe that illegal drugs were on the bus. Nor did they have articulable suspicion to suspect the presence of illegal drugs. The detectives knew only that the west coast is a source area for illegal drugs. The detectives did not have the passengers' permission to examine their luggage. Bus officials did not notify the passengers that their luggage was subject to inspection. What occurred here, plain and simple, was a suspicionless police sweep of a bus in interstate travel.

United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998)

A. **The physical manipulation of Mr. Grobstein's bag violated his Fourth Amendment right against unreasonable searches.**

Personal luggage is an "effect" protected by the Fourth Amendment. *Bond v. United States*, 529 U.S. 334, 336-37 (2000). In *Bond*, the Supreme Court held that an agent's "physical manipulation" of a bus passenger's bag stored in the overhead luggage bin of a bus violated the Fourth Amendment where the agent "conduct[ed] a probing tactile examination

of petitioner's carry-on luggage." *Id.* at 337-339. The Court asked two questions in reaching this holding: First, did the individual "through his conduct," exhibit a privacy expectation in the bag? And second, was the individual's expectation of privacy "one that society is prepared to recognize as reasonable?" *Id.* at 338. The Court answered both of these questions affirmatively. The petitioner's bag was opaque, thus he wanted the contents to remain concealed, and although a bag placed in an overhead bin will likely be moved and handled, "he does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-339.

Courts have applied the same analysis to luggage placed in the bus's underneath cargo area. *See, e.g., United States v. Winborn*, 2002 WL 1484489, at *6 (D. Neb. 2002)(unreported) (comparing the privacy expectation articulated in *Bond* associated with bags placed in overhead bin of bus to bags stored under the bus and finding that "the defendant has a subjective expectation of privacy when his bag is placed in a "bay" underneath a bus. In both situations, the person who placed his or her bag on the bus has an expectation that the luggage will not be subjected to physical manipulation by others. This court concluded that the defendant's subjective expectation is one that society is prepared to recognize as reasonable.").

In the Tenth Circuit case quoted above, four detectives in Oklahoma City awaited a Greyhound bus traveling from San Diego, California, to New York City. *Nicholson*, 144 F.3d at 634. After the passengers departed the bus for a layover, two detectives boarded the bus, pulled the bags out of luggage bins and manipulated them. *Id.* at 635. At the same time, the other two detectives pulled the defendant's bag out of the underneath cargo area, "felt the sides of the bag with his palms perpendicular to the ground and flat, and detected 'several

large bundles' inside it." *Id.* at 634. These actions are identical to the actions of Agent Perry and Detective Walsh when searching luggage from the cargo bay caught on Greyhound's surveillance cameras. One detective in *Nicholson* testified that this was "probably not" the only bag handled this way. *Id.* The court held that the manipulation of both the carry-on luggage and the luggage stored underneath the bus resulted in unconstitutional searches. *Id.* at 639-40.

Mr. Grobstein's bag was located in the vacant seat next to his own. For the duration of the trip, he had kept the bag either in the seat next to him, or underneath his feet. Even more so than the action of placing a carry-on bag in an overhead bin, Mr. Grobstein's actions exhibit the clear intent to keep the contents of his bag private. While Greyhound does not place surveillance cameras inside of their buses that could have documented Detective Walsh's and Perry's movements throughout the interior of the bus, they spent a total of over 12 minutes in the empty passenger compartment alone, with the doors closed, after the officers collectively spent roughly 22 minutes opening the bus's underneath cargo bins, pulling out and manipulating bags in order to detect contraband.

There was only one reason for Perry and Walsh to enter the vacant bus during servicing that night, and it was to manipulate the bags on the bus in the same way they manipulated the bags underneath the bus. Without doubt, as evidenced by their uncanny accuracy and efficiency on the bus during their purported "consensual encounters"—targeting two specific individuals and making arrests of both—Perry and Walsh squeezed and felt the carry-on bags in the passenger compartment too. It is very plausible that with the increased privacy of the empty and secluded interior of the bus, both Perry and Walsh did more than manipulate the bags and may have opened and searched the bags as well. Either

way, the search was unconstitutional under *Bond*. The later search of Mr. Grobstein's effects and Mr. Grobstein's statements were the fruit of this initial illegal search and must be suppressed. See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

B. Agent Perry's search of Mr. Grobstein's bag was the eventual product of coercion and intimidation.

When reviewing a bus encounter for Fourth Amendment purposes, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 435-437 (1991) The encounter is unconstitutional if, when "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id.* at 437. Due to fact that Perry had already concluded Mr. Grobstein's bag contained contraband, likely through the illegal exploratory squeezes described above, Perry was determined to search Mr. Grobstein's bag. Evidence of Perry's intent is admissible to prove he acted in conformity with that intent. See Fed. R. Evid. 404(b). Perry's "sneak and peak" earlier illegal search makes it more likely he acted in the way Mr. Grobstein described—determined and unrelenting.

The voluntary nature of consent is a question of fact, and the court considers the totality of the circumstances in making this determination. *United States v. Dozal*, 173 F.3d 787, 795 (10th Cir. 1999). Relevant factors to consider in a totality of the circumstances analysis include "the threatening presence of several officers," the use of "aggressive language or tone of voice by an officer indicating compliance is compulsory," and interaction

in a small space. *United States v. Rogers*, 556 F.3d 1130, 1137-38 (10th Cir. 2009); *see also Florida v. Royer*, 460 U.S. 491, 496 (1983) (noting that the defendant “found himself in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment,” and the defendant’s “consent to search, given only after he had been unlawfully confined, was ineffective to justify the search.”) (internal quotation marks and citation omitted).

Although not dispositive, whether the defendant received notification of the right to refuse consent is another “relevant fact to consider.” *United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000). No such notification was given to Mr. Grobstein. The government bears the burden of proof and “must show that there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given.” *United States v. Soto*, 988 F.2d 1548, 1557 (10th Cir. 1993).

1. Agent Perry subjected Mr. Grobstein to intimidation and coercion the second Mr. Grobstein re-boarded the bus.

When Mr. Grobstein reboarded the bus and began walking to his seat, he saw Detective Walsh, in plain clothes, but clearly a law enforcement officer, conducting a drug interdiction and interrogating a fellow passenger. As he looked back toward his seat, he could see Agent Perry standing in the middle of the aisle, right next to his seat, apparently waiting for the seat’s occupant. Mr. Grobstein is 22 years old, 5’6” in height, and 125 lbs. in weight. Agent Perry, from counsel’s observations during courtroom appearances, appears to be at least 5’9” in height and 180 lbs. in weight. He has been a DEA Agent for 15 years. When Grobstein arrived at his seat, and before he could sit down, Agent Perry immediately

identified himself as an officer, showed him a badge on his side next to a pair of handcuffs, and began asking him questions.

From the minute Mr. Grobstein boarded the bus, saw Walsh's drug interdiction taking place in the front of the bus, and saw an officer waiting next to his seat, it was clear that Detective Walsh and Agent Perry had identified two clear targets for investigation before the re-boarding had begun. The pressure and ultimate outcome of the encounter was palpable before Mr. Grobstein ever exchanged words with Agent Perry.

This situation, where officers have already pre-determined their suspects—a tactic made perfectly clear to the passengers on the bus due to the officers' keen focus on two distinct passengers and disinterest in everyone else—is a far cry from a situation where officers board a bus and make casual contact with multiple passengers methodically throughout the bus. *See, e.g., United States v. Dreyton*, 536 U.S. 194, 198, 204 (2002) (during a bus interdiction, the officer “spoke to the passengers one by one and in a polite, quiet voice,” working his way from the back of the bus toward the front, “speaking with individual passengers as he went. He asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks.”); *see also United States v. Tapia*, 309 F.3d 1283 (10th Cir. 2002) (during a bus interdiction, task force officers boarded a bus after passengers boarded, and told the passengers they were going to talk to “each and every one of [them]. It is not our intent in any way to delay your trip. I want you to feel free to move about . . . the bus as usual.”). *Id.* at 1285 (alteration in original).

Additionally, the coercive nature of Detective Walsh standing in the front of the bus investigating potential criminal activity while Agent Perry stood next to Mr. Grobstein's seat waiting to do the same is a far cry from the simple presence of multiple officers positioned

throughout a bus. *See, e.g., Tapia*, 309 F.3d at 1286 (holding that the presence of multiple officers is not, standing alone, coercive behavior). Mr. Grobstein was not simply on a bus with a couple of officers; he was pinned between a criminal investigation in progress, and an investigation into his own alleged criminal activity.

2. Agent Perry's behavior demanded permission to search Mr. Grobstein's bag.

After he refused to allow Perry to search his bag multiple times when asked, and after Perry outright demanded that Mr. Grobstein let him search his bag, it appeared to Mr. Grobstein, as it would appear to any other reasonable person, that he had no other choice than to yield to Perry's—a DEA Special Agent and 15-year veteran—demand. At that point, no reasonable person in the same situation would have felt that he could cease the encounter. Mr. Grobstein had attempted to do so several times, and Perry would not let up or go away. In *United States v. West*, 219 F.3d 1171, 1177 (10th Circuit 2000), a defendant challenged his “consent” to a vehicle search after an officer “asked if [he] could look in the vehicle and he paused for a while and then he finally said yes.” *Id.* at n. 4. In holding this consent to be valid, the court noted that:

there were no threats made, no cajoling, or demand of defendant to obtain consent. No pressure was applied by [the officer] against the defendant. The district court found nothing ambiguous or equivocal in [the defendant's] affirmative response to [the officer's] request for permission to search the car. We find nothing in the record to indicate that the district court erred in finding that [the defendant] voluntarily consented to the search of his car.

Id. at 1177.

In stark contrast to the court's analysis of the situation in *West*, Perry first attempted to persuade, and then demanded outright that Mr. Grobstein consent. Perry applied an unyielding pressure to Mr. Grobstein with his persistence and aggressive demeanor. *Cf.*

United States v. Alvarez-Manzo, 625 F. Supp. 832, 842-43 (D. Neb. 2008) (“The defendant did not have an opportunity to refuse to talk to the officers—because their behavior demanded an answer to their question. The officer then repeated the question, demanding confirmation that the luggage was the defendant’s.”) Additionally, Mr. Grobstein’s response that he “supposed” but would “rather not” allow Perry to search the bag is the epitome of an equivocal response, and further evidences the coercive nature of the encounter, rather than consent. *See generally Dreyton*, 536 U.S. at 199 (holding that there was clear consent for searches because the evidence showed that when the officer made it to the defendants’ seats, after talking to all passengers in between, both defendants readily consented to a search of their one shared bag on the overhead luggage rack and to pat-down searches).

The Government, through Assistant United States Attorney Paul Mysliwicz, opposes this motion.

C. Mr. Grobstein Requests an evidentiary hearing.

Mr. Grobstein requests an evidentiary hearing to develop the facts supporting his claim. In connection with the requested evidentiary hearing, defense counsel hereby requests, pursuant to Fed. R. Crim. P. 12(h) and 26, that the government supply the prior statements (including Grand Jury testimony) of all suppression hearing witnesses including Agent Perry at least 48 hours prior to the evidentiary hearing in this matter in order to avoid recesses during the course of the suppression hearing as anticipated by Fed. R. Crim. P. 26.2(d).

III. CONCLUSION

Wherefore, Mr. Grobstein requests that the Court find Agent Perry’s search of his bag and subsequent seizure of contraband the product of unconstitutional search techniques and

oppressive questioning rendering any alleged consent unlawful. All direct or indirect evidence located as a result of this unconstitutional behavior must be suppressed as the fruits of an unconstitutional search and questioning.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of May, 2013 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Paul Mysliwicz
Assistant United States Attorney

 /s/ *Peter Schoenburg*
ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, SCHOENBURG & BIENVENU, LLP