

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Crim.A.No. 00-82-GMS
v.)	
)	
DAMEON L. GREY,)	
)	
Defendant.)	
)	

MEMORANDUM OPINION

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Attorneys for the Plaintiff

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Dated: August 23, 2001
Wilmington, Delaware.

SLEET, District Judge

I. INTRODUCTION

On December 12, 2000, the Grand Jury for the District of Delaware returned a four count indictment against the defendant, Dameon L. Grey (“Grey”). Count I charges Grey with possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Count II charges Grey with possession with intent to distribute more than five grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Count III charges Grey with carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Finally, Count IV charges Grey with possession of a firearm with an obliterated serial number in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B). On March 1, 2001, Grey filed an omnibus pretrial motion which included a motion to suppress the seizure and search of his property and statements arising out of his arrest (D.I. 16).

The court conducted an evidentiary hearing on Grey’s motion to suppress on May 31, 2001. Subsequently, the parties stipulated to (and the court approved) an extended briefing schedule (D.I. 31-32). After hearing the testimony at the evidentiary hearing and considering the arguments the parties raise in their briefs, the court concludes that the police did not violate Grey’s Fourth Amendment rights. The court will therefore deny Grey’s motion to suppress in its entirety. The following sections explain the facts and the law upon which the court bases its ruling.

II. FINDINGS OF FACT

At the evidentiary hearing, the Government called three witnesses: Delaware State Police Trooper Gregory Simpler, then-Trooper Douglas Rentz,¹ and Corporal Dennis Spillan. Grey did not testify, nor

¹Subsequent to the incident at issue in this case, Tr. Rentz was promoted to the rank of corporal. For the purposes of this memorandum opinion, however, the court will refer to him as Tr.

did he call any witnesses in his defense. The court makes the following essential findings of fact as required by Rule 12(e) of the Federal Rules of Criminal Procedure.

On the morning of October 24, 2001, Tr. Simpler was on routine patrol in a marked patrol car driving northbound in the right lane of Route 13, in New Castle, Delaware. At some point, he looked into his rear view mirror and saw a blue Ford Taurus (the “Taurus”) traveling “at a high rate of speed [and] making lane changes without [a] turn signal.”² Since the speed limit was 55 miles per hour, Tr. Simpler sped up until his speedometer read “55”.³ He did this to see whether the Taurus would overtake and pass him. It did. Tr. Simpler saw the car contained two people and he estimated that it was traveling 70 miles per hour. Once the Taurus passed Tr. Simpler’s vehicle, it switched into the left turn lane and signaled it was making a left turn. Tr. Simpler was able to get behind the Taurus and follow it through the left turn. After making the left turn, Tr. Simpler activated his emergency lights and signaled for the Taurus to pull over into the parking lot of an Arby’s Restaurant (the “Arby’s”).⁴ As he did so, Tr. Simpler called into Delaware State Police Dispatch. Apparently seeing the flashing lights, the Taurus pulled into the Arby’s parking lot and came to a stop.

After stopping, Tr. Simpler got out of his patrol car, approached the Taurus, and asked the driver

Rentz.

²Tr. Simpler testified that the weather was “clear.”

³According to the “speedometer calibration log,” the speedometer in Tr. Simpler’s patrol had been calibrated on September 29, 2000.

⁴Tr. Simpler testified that he decided to stop the Taurus because it was traveling above the speed limit and because of “multiple” lane changes without signaling.

“the standard questions” (for his driver’s license, registration, insurance and where he was going).⁵ The driver, Derrick Wright, was unable to provide Tr. Simpler with any identification or proper vehicle registration.⁶ Furthermore, Wright stated that he worked at Arby’s and had seen Grey, who he knew from high school, in the parking lot. According to Wright, Grey told him that he had just missed the bus and asked Wright to drive him to the next stop so that he could get the bus from there. Wright agreed and drove Grey to the next bus stop, but was unsuccessful in catching the bus. As a result, Wright claimed he turned around and returned to the Arby’s parking lot.

Because Wright was unable to provide the requested identification information and “gave a peculiar story,” Tr. Simpler asked him to exit the Taurus and asked him several other questions about his identity and where he was going. At some point, Tr. Simpler instructed Wright to return to the driver’s seat of the Taurus and he returned to his patrol car to check the information Wright provided him.⁷ Tr. Simpler’s computer check revealed that Wright’s driver’s license was suspended in Delaware. Although the Taurus had West Virginia license plates, Tr. Simpler was unable to find a record of registration.⁸

While Tr. Simpler was speaking to Wright, Tr. Rentz, drove up to assist him. Tr. Rentz testified

⁵At that point, Tr. Simpler noticed that Grey was in the passenger’s seat of the car.

⁶Wright is not a defendant in this case.

⁷The record is a bit unclear when during the questioning Wright exited and returned to the car and when Tr. Simpler attempted to verify Wright’s information. The timing, however, is immaterial to Grey’s motion since (1) the ultimate result of the questioning and computer check is undisputed and (2) Grey does not have standing to challenge actions regarding Wright.

⁸At the conclusion of the incident, the owners of the Taurus came out of the Arby’s and spoke to the police. Since this was well after the events which gave rise to the circumstances at issue, any information that the owners of the Taurus provided the police is immaterial to the instant motion.

that he had been in the area, heard Tr. Simpler's call to dispatch, and decided to assist Tr. Simpler out of a concern for "officer safety" and because "[i]f we can . . . we always try to back each other up on a stop."⁹ Upon arriving at the scene, Tr. Simpler informed Tr. Rentz that someone in the car lacked identification. Since Tr. Rentz believed Tr. Simpler was referring Wright, he asked Grey to step out of the passenger's seat of the Taurus and to step to the back of the vehicle so that he could ask him some questions.¹⁰ Tr. Rentz testified that "[o]n stops we have had in the past where drivers don't have identification, we like to separate out the driver and the passenger so we can obtain the true identity of all the occupants." Thus, it would appear that, under the circumstances, Tr. Rentz's request that Grey step to the rear of the Taurus was a procedure employed by the officers to achieve a legitimate investigative goal – to establish the true identity of the occupants of the Taurus. Tr. Rentz then asked Grey the identity of the driver and for his identification. Although Tr. Rentz thought Grey appeared nervous,¹¹ he observed that Grey spoke and understood English well and did not appear to be under the influence of any alcohol or drugs.¹²

Grey's explanation to Tr. Rentz was similar to the one Wright gave to Tr. Simpler. Grey stated

⁹Tr. Rentz also testified that when Tr. Simpler called in the stop, he stated that the Taurus had a West Virginia license plate. Such a plate was "unusual" to Tr. Rentz since "[w]e don't get a lot of West Virginia Plates in Delaware. We do get a lot of New Jersey, Pennsylvania, and Maryland. But West Virginia is a rare occasion to come through Delaware."

¹⁰Tr. Simpler testified that he was with Tr. Rentz when Grey exited the Taurus so that both the officers could ask him some questions.

¹¹Tr. Simpler testified that he Grey was "calm" while speaking to Tr. Rentz.

¹²In his testimony, Tr. Simpler also stated that he observed Grey understood and spoke English well and did not appear to be under the influence of drugs or alcohol.

that he only knew the driver by the nickname “B” from high school.¹³ Tr. Rentz stated that Grey told him that he had been in the area of Quigley Boulevard (which was just south of the Arby’s), that Wright took him to a Wendy’s restaurant but he missed the bus, and that the two were coming back to the Arby’s parking lot. Although Tr. Rentz could not remember anything specific which triggered his suspicions, he thought “the [entire] story didn’t make sense.” Tr. Simpler also thought the story Grey and Wright told the officers seemed “suspicious” since there were two people in the same car who “say they know each other, but they don’t know each other’s names.”

As a result of his suspicions – and because he “knew we had something that was wrong” but could not identify it – Tr. Rentz decided to get assistance from Cpl. Spillan, “a more experienced [officer].” Indeed, Cpl. Spillan had approximately 13 years of experience with the Delaware State Police. Upon arriving at the scene, Cpl. Spillan saw Tr. Rentz and Tr. Simpler in their patrol cars. Wright was sitting in the driver’s seat and Grey was standing by the back of the Taurus.¹⁴ Upon his arrival, Tr. Simpler and Tr. Rentz briefed Cpl. Spillan regarding the nature of the events to date. Specifically, Tr. Rentz told Cpl. Spillan that (1) the Taurus had fictitious West Virginia license plates, (2) the driver could not produce identification, (3) Grey was sitting in the passenger’s seat at the time of the stop and (4) Grey’s story about why he was in the Taurus did not make sense.¹⁵

¹³Tr. Simpler stated that Grey said he knew Wright by the nickname “D.” Tr. Rentz had no independent recollection of the nickname – he had to refer to his notes. This discrepancy is immaterial, however.

¹⁴Tr. Rentz stated that he and Tr. Simpler were at the back of the Taurus with Grey when Cpl. Spillan arrived. The court, however, finds that this difference in testimony is immaterial.

¹⁵Tr. Rentz may have relayed some of this information to Cpl. Spillan over the radio, before his arrival at the scene.

After being brought up to speed on the situation, Cpl. Spillan went to Grey and asked him “basic information that he could use to confirm [Grey’s] identity in the computer” (i.e., name, address, and date of birth). Grey responded to Cpl. Spillan’s questions. Cpl. Spillan also asked Grey if he had any prior arrests “for purposes of confirming his identity.” Cpl. Spillan testified that his reason for asking about prior arrests was that “[a]n individual who has been arrested would know the date and the charge he was arrested for that somebody using his name might not know.” Cpl. Spillan then returned to his vehicle and attempted to confirm Grey’s identity by entering the information Grey provided him in the Criminal Justice Information System (CJIS).¹⁶ As he was checking the information, Cpl. Spillan observed that Grey had his right arm leaning on the trunk of the Taurus, that he was relaxed and calm, and that “he was just waiting to hear from us.” Cpl. Spillan testified that Grey appeared to be in his late teens or early twenties, that he appeared to be a native English speaker and understood the language, and that he did not appear to be under the influence of any drugs or alcohol.

While Cpl. Spillan was talking to Grey and confirming his identity, the other officers were otherwise engaged. Tr. Simpler returned to Wright (still in the driver’s side seat) and asked him to sit in the rear of his patrol car. While in his patrol car, Tr. Simpler attempted to determine whether the name Wright had provided was his true name. Tr. Rentz was initially with Cpl. Spillan while he was talking to Grey but quickly left and returned to his vehicle to do paperwork on the Taurus.¹⁷ Indeed, Tr. Rentz

¹⁶CJIS is a computer system maintained by the state of Delaware which contains criminal histories.

¹⁷There is a bit of a discrepancy in the testimony since Cpl. Spillan stated that he was alone while he questioned Grey. Under the circumstances, however, it is immaterial whether Tr. Rentz was briefly with Cpl. Spillan or whether he left soon after the questioning began.

testified that “I was there for the beginning of the conversation, and I heard him [Cpl. Spillan] asking a lot of the same questions that I had started asking. I [then] went back [to my vehicle].”

After confirming Grey’s identity, Cpl. Spillan went to Tr. Simpler and Tr. Rentz and informed them that he was going to let Grey go since he was not wanted and there was no reason to hold him further. Cpl. Spillan then approached Grey (who was still standing, unattended, at the rear of the Taurus) and told him that he could “get whatever personal belongings he ha[d] with him and he [was] free to go.” Grey responded by asking whether he could “retrieve his book bag” from the Taurus. Although Grey had never mentioned his book bag to any of the officers before (nor had any of them seen it), Cpl. Spillan told Grey he could go to the car and get it. Grey went to the passenger side door of the Taurus (which was less than 12 feet away from where he was standing), reached in, and grabbed a “grayish-black” book bag from the passenger floor. Cpl. Spillan testified that he was “pretty certain” that he did not follow Grey to the passenger door or make any moves in that direction.

As (or immediately after) Grey retrieved the book bag, Cpl. Spillan asked him “if he had anything in the book bag that he wasn’t supposed to have or any illegal items.” Cpl. Spillan did not draw his service firearm or have anything else in his hands when he asked Grey this question. Cpl. Spillan testified that the reason he asked Grey about the book bag was that “[h]e was picking up a bag that I had not previously searched. It was on him, in my area. I was concerned for officer safety.” After Cpl. Spillan asked Grey about the contents of the book bag, Grey looked at him with a “scared look on his face or a startled look” On cross examination, Cpl. Spillan described Grey’s expression as “three whites of the eyes,” which he described as:

something where people who are alarmed, scared or getting ready to do something, it’s

a physical reaction your body goes through, he [Grey] gave me that look. The look, ‘Oh, my God, I have been caught, I am in trouble.’ . . . The look could range from ‘I am about to fight you, I am about to run, I am about to hurt you, [or] I am about to sit here and say I am in trouble.’

Upon seeing Grey’s sudden and dramatic change of expression, Cpl. Spillan immediately became “leery.” Cpl. Spillan then took a large step toward Grey (Grey was by the passenger door and Cpl. Spillan was at the rear of the vehicle), took the book bag from him (Grey released it without resistance),¹⁸ and placed it on the trunk of the Taurus (right near where the two were standing).¹⁹ When Cpl. Spillan “reached into [Grey’s] person” he was at the rear of the passenger door (the Taurus was a four door vehicle). Cpl. Spillan testified that the Grey’s changed demeanor and his experience in similar situations is what prompted him to grab the book bag. After Cpl. Spillan placed the book bag on the trunk of the car, Grey answered Cpl. Spillan’s initial question regarding the bag’s contents in the negative.

Once the book bag was on the trunk of the Taurus, Cpl. Spillan asked Grey for permission to search it. The reason Cpl. Spillan asked Grey if he could search the book bag was that “[he] had a container in his possession now that hadn’t been searched. I was concerned for officer safety, for myself and the other two troopers who were at the scene.” Grey gave Cpl. Spillan permission to search the book bag, stating that “he did not mind.” When Grey stated that Cpl. Spillan could search the book bag, he was

¹⁸During cross examination, Grey tried to get Cpl. Spillan to state that Grey released the bag only after he pulled it. The court, however, believes that Cpl. Spillan grabbed and Grey released the bag almost simultaneously.

¹⁹Tr. Simpler testified that his report stated that Cpl. Spillan actually retrieved the bag from the floor of the car. Tr. Simpler, however, did not see any of the interaction between Grey and Cpl. Spillan (including the retrieval of the bag). Since Tr. Simpler did not see the events in question – and the court finds Cpl. Spillan’s account credible – the court finds that the above mentioned chain of events is what actually transpired.

not restrained in handcuffs, there were no other officers around him, and Cpl. Spillan did not have anything in his hands.

After Grey gave his consent to the search, Cpl. Spillan proceeded to unzip the main compartment of the book bag. As the bag opened, Cpl. Spillan observed a black handgun “slide down” with a magazine inserted in the weapon – i.e., it was loaded.²⁰ Cpl. Spillan took custody of the weapon with his left hand and held it behind his back. With his right hand, Cpl. Spillan grabbed Grey and pushed him toward the Taurus. He then called out to Tr. Rentz that he had a gun and stated that he had found it in Grey’s book bag. Tr. Rentz exited his patrol car, went to Cpl. Spillan and Grey, and grabbed the weapon from Cpl. Spillan’s hand. Grey was handcuffed and placed in the back of Tr. Rentz’s patrol car. Tr. Rentz then returned the firearm to Cpl. Spillan, who “rendered it safe” and placed it on the dashboard of his patrol car. Neither Tr. Rentz nor Cpl. Spillan continued searching through Grey’s book bag. At that point, Cpl. Spillan directed Tr. Simpler to take Wright into custody as well. Grey, Wright, the book bag and the Taurus were all transported to Troop 2 “for further investigation.”²¹

Approximately 30-45 minutes after arriving at Troop 2, Cpl. Spillan (with Tr. Simpler “sitting in”) conducted an interview with Grey in one of the offices in the Street Crimes Unit. None of the officers had talked to Grey prior to the interview. The interview was recorded.²² Cpl. Spillan began by advising Grey

²⁰The gun was later identified as a black Statler Arms 9mm semiautomatic handgun with an obliterated serial number.

²¹At Troop 2, Wright was questioned about his knowledge of the handgun, issued citations for traffic violations, and released without further incident.

²²The government played the tape at the suppression hearing and the court admitted it into evidence (Gov’t Hrg. Ex. 3).

of his *Miranda* rights. Grey replied that he understood his rights but that he wished to speak to Cpl. Spillan. During the interview, Grey stated that (1) Cpl. Spillan had asked him whether he had anything in the book bag “that he wasn’t supposed to have” and that he had said “no,” (2) Cpl. Spillan had asked for permission to search his book bag and he assented, (3) he admitted that he owned the handgun Cpl. Spillan found and (4) he had previously been convicted of a felony and that he knew he was not supposed to possess a firearm. Grey, however, stated that he was unaware that the handgun had a serial number or that it had been obliterated (although, at the interview, he recognized that there was a “big silver spot” and there were no serial numbers.²³

After the interview, Grey was placed back in the detention room while Cpl. Spillan and Tr. Simpler went into an office to type up an arrest warrant.²⁴ Cpl. Spillan and Tr. Simpler conducted a routine inventory search of Grey’s book bag prior to placing it in the temporary evidence locker. During the inventory search, they found approximately 7.9 grams of a white substance in rock form wrapped in 13 individually wrapped bags. The substance, which was found in the front pocket of the book bag, later tested positive for crack cocaine.

During the hearing, the government moved the book bag, the cassette tape of Grey’s interview, and the handgun into evidence. After establishing the proper chain of custody, and without objection from Grey

²³The rest of the interview concerned Grey’s explanation of how he had obtained the handgun, why he obtained it, and a more complete account of Grey’s whereabouts on that day. Since these statements are not relevant to the issues presently before the court, the court will not describe them.

²⁴At the hearing, the government pointed to an apparent difference between the affidavit of probable cause and the testimony of the officers. To explain the discrepancy, Tr. Simpler and Cpl. Spillan stated that the apparent inconsistencies resulted from a “typo” which resulted from joint preparation. The court finds the officers’ testimony credible and finds the discrepancy inadvertent and immaterial.

the court admitted them into evidence as Gov't Ex. 1 (book bag), Gov't Ex. 3 (cassette tape) and Gov't Ex. 4 (handgun).

III. DISCUSSION

The parties have agreed that the instant motion raises two issues: (1) the legality of the Cpl. Spillan's warrantless seizure of the book bag and (2) the validity of Grey's subsequent consent to Cpl. Spillan's search of the book bag. Since the court finds that (1) Cpl. Spillan's seizure of the book bag was based on reasonable suspicion and was reasonable under the circumstances and (2) Grey's consent to search was voluntary, knowing, and intelligent, the court will deny the motion to suppress. The court will discuss the issues in turn.²⁵

A. Seizure of The Book Bag

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." *See* U.S. Const. Amend. IV. The Supreme Court has interpreted the Fourth Amendment reasonableness requirement to mean that seizures must be based on probable cause and executed pursuant to a warrant. *See, e.g., Katz v. United States,*

²⁵Although Grey does not directly raise the issue, Cpl. Spillan's question to Grey as to whether he had anything illegal in his book bag was entirely proper. Absent some showing that Grey was not free to leave at the moment Cpl. Spillan asked him the question, such a circumstance does not rise to the level of a Fourth Amendment event. *See United States v. Kim*, 27 F.3d 947 953-54 (3d Cir. 1994) (finding that one "potentially incriminating question," standing alone, does not make encounter with police officer coercive); *see also United States v. Beck*, 140 F.3d 1129, 1135 (8th Cir. 1998) (holding that after police officer told defendant he was free to go, officer's question whether defendant had any drugs, knives, or contraband did not turn encounter into seizure). Since Grey has not made such a showing, the court need not address whether Grey was seized within the meaning of the Fourth Amendment at the time Cpl. Spillan asked his initial question.

389 U.S. 347, 357 (1967). It is undisputed that Cpl. Spillan seized Grey's book bag when he took it from him and placed it on the trunk of the Taurus. It is similarly undisputed that Cpl. Spillan had neither a warrant or probable cause. Given this, the Government bears the burden of showing that Cpl. Spillan's seizure of the book bag was reasonable and falls within one of the enumerated exceptions to the warrant requirement.²⁶ See *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995).

The Government's showing of reasonableness for a Fourth Amendment seizure is not limited to a determination of probable cause.²⁷ Rather, police have constitutional authority to conduct a limited investigatory stop or seizure if the officer has a "reasonable articulable suspicion" that criminal activity may be afoot. See *United States v. Solokow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). It is well established that "reasonable articulable suspicion" is defined as "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion." See *Terry*, 392 U.S. at 21; *United States v. Rickus*, 737 F.2d 360, 365 (3d Cir. 1984). There are two questions that the court must address. First, whether Cpl. Spillan had reasonable suspicion to seize Grey's book bag. Second, whether Cpl. Spillan's conduct was reasonable under the circumstances.

1. Cpl. Spillan Had Reasonable Suspicion

²⁶The Supreme Court has held that the standards applicable to the detention of objects are identical to those which govern the seizure of an individual. See *United States v. Place*, 463 U.S. 696, 706 (1983).

²⁷Grey spends much of his brief discussing whether the police can search a car and containers that are inside the car on less than probable cause. Despite the defendant's suggestions that Cpl. Spillan's testimony was not credible, the court does not believe that Cpl. Spillan reached inside the Taurus and retrieved the book bag. Not only was this not the version of events that Cpl. Spillan repeated at the suppression hearing, but his report states that "he [Grey] retrieved it [the book bag] from the interior of the car." See Def. Ans. Br., Ex. B.

In determining whether an officer's suspicion amounts to "reasonable suspicion," the court must consider the totality of the circumstances. See *United States v. Cortez*, 449 U.S. 411, 417 (1981). A mere "hunch" or "inchoate and unparticularized suspicion" is insufficient to justify an investigatory detention. See *Solokow*, 490 U.S. at 7. Nevertheless, in determining whether a police officer has reasonable suspicion, the court should afford deference to the officer's conclusions based on his or her experience. See *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998). Further, law enforcement officers' personal observations and "commonsense judgments and inferences about human behavior" can provide a legitimate basis for reasonable suspicion. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

The Government argues that, under the totality of the circumstances, the following factors establish that Cpl. Spillan had reasonable suspicion: (1) Cpl. Spillan, an officer with 13 years experience, was called to the Arby's because Tr. Rentz and Tr. Simpler felt that the situation was "suspicious," (2) Cpl. Spillan was informed of the "suspicious circumstances" and knew that, at this point, the incident was more than a routine traffic stop for speeding (i.e., Wright did not have identification or a valid license, the Taurus had fictitious plates, Wright and Grey's stories did not add up), (3) when Cpl. Spillan told Grey he was free to leave, Grey retrieved a previously unknown and unidentified object and brought it within close proximity to Cpl. Spillan, (4) when Cpl. Spillan asked Grey about the contents of the book bag, Grey's demeanor suddenly and dramatically changed from calm to startled and (5) based on his experience, Cpl. Spillan believed Grey's expression could have had a variety of meanings, including placing Cpl. Spillan and the other officers in danger.

As an initial matter, Grey seeks to draw a sharp line between the circumstances before Cpl. Spillan

told Grey he was free to leave and those after he did so. Essentially, his argument is that once Cpl. Spillan satisfied himself that Grey was not engaged in criminal activity and told him he was free to leave, he could not rely on his earlier suspicions. The court need not engage this argument since there is no dispute that Grey's sudden change in demeanor was the major impetus behind Cpl. Spillan's actions. *See* Pl. Reply Br. at 4. There was no testimony regarding whether Cpl. Spillan thought back to the previous circumstances at the time of Grey's "look." In any event, the court is unwilling to establish a bright line distinction in light of the rapidly changing dynamic of the situation.

Turning to the existence of reasonable suspicion, the lynchpin of Grey's argument appears to be that Cpl. Spillan's testimony regarding Grey's reaction and his claims of officer safety are nothing more than *ex post* justifications for an illegal seizure. The court, however, disagrees with this characterization. As mentioned above, the court found that the officers (including Cpl. Spillan) credibly explained the events, their reactions, and the reasons for why they acted the way they did.²⁸ Cpl. Spillan had ample reasonable suspicion to separate Grey from his book bag. As noted above, Cpl. Spillan merely asked Grey an innocuous question about the legality of contents of his book bag. Rather than merely responding negatively, Grey's demeanor dramatically changed from calm to scared. Therefore, Cpl. Spillan could have reasonably concluded that Grey had been or was imminently planning on engaging in criminal activity. Further, Cpl. Spillan testified that, in his experience, the "three whites of the eyes" look that Grey gave him

²⁸In his brief, Grey makes much out Cpl. Spillan's failure to mention Grey's "look" in his report or that he was concerned for officer safety. The court is not convinced that these omissions are sufficient to undermine Cpl. Spillan's credibility. Although it is true that Cpl. Spillan's report omitted these facts, there was no testimony or showing that Cpl. Spillan ordinarily would have included this information in his report of the incident. Nor did the cross examination establish the lack of a credible explanation for their omission.

suggested that he could have been engaged in criminal activity and/or that Cpl. Spillan and his fellow officers might have been in physical danger. Therefore, Cpl. Spillan's belief that criminal activity was afoot and his fear for his safety were sufficient "specific and articulable" grounds upon which he could conclude that he had reasonable suspicion to seize Grey's book bag.

2. Cpl. Spillan Acted Reasonably

The court must next determine whether, under the totality of the circumstances, the length of Cpl. Spillan's seizure of Grey's book bag was reasonable.²⁹ In the case of objects, temporary seizures are constitutional so long as they work only a minimal intrusion upon the owner's privacy interest in the property and are short in duration. *See United States v. Frost*, 999 F.2d 737, 741 (3d. Cir. 1993); *see also Florida v. Royer*, 460 U.S. 491, 500 (1983) (holding that permissible scope of investigative detention is fact intensive but must be temporary, last no longer than necessary, and should use "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.").

According to the Government, the salient factors for the court to consider are (1) Cpl. Spillan's diligence in conducting the investigation, (2) the duration of the seizure, and (3) whether the book bag was transported by the police to a different location from where it was originally seized. *See Pl. Op. Br.* at 18. The court agrees with the Government but would also add that the exigencies of the instant circumstances are also relevant in determining the reasonableness of Cpl. Spillan's actions. *See Place*, 462 U.S. at 703-07; *Frost*, 999 F.2d at 741-42.

²⁹As noted in the findings of fact, Grey released the book bag at the same time that Cpl. Spillan "grabbed" it; there was no struggle or outward resistance by Grey to Cpl. Spillan's actions. *See note 18, supra.*

Cpl. Spillan's seizure of Grey's book bag was, under the circumstances, entirely reasonable. First, Cpl. Spillan seizure was directly related to his concerns for officer safety – given Grey's demeanor, he was wary of what the book bag contained and wanted to conduct a safety check. Second, Cpl. Spillan did not move the book bag far from Grey's person – he placed it on the trunk of the car which was rather close to where the two were standing. Third, the safety check was done quickly and was limited in scope – Cpl. Spillan stopped searching the bag once he discovered the gun.³⁰ Fourth, the book bag was close to Grey at all times, was constantly in his sight, and was not moved or transported to another location until the weapon was found. Fifth, the exigency of the situation required Cpl. Spillan to “grab” the book bag from Grey without permission.³¹

B. Consent To Search

As stated above, in the absence of a warrant or probable cause, the court must determine whether there is an applicable exception to the Fourth Amendment's prohibition. When there is valid consent, a search is constitutionally permissible. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The Government bears the burden of proving that consent was “freely and voluntarily given.” *See id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). Whether consent to a search was “voluntary”

³⁰By this statement the court does not mean to suggest that Cpl. Spillan was entitled to search the bag at this point. This point is immaterial, however, since the Government has demonstrated an exception to the warrant requirement. As is discussed below, Grey's consent to search the book bag rendered Cpl. Spillan's search entirely proper.

³¹As the court already noted, Grey did not inform Cpl. Spillan that the book bag did not contain anything illegal until after Cpl. Spillan had placed it on the trunk of the Taurus. The court is unclear whether this was because of the speed of events or because Grey did not answer Cpl. Spillan's question immediately. To the extent that Grey was silent in the face of an officer's concern for his safety, this may be another fact which suggests Cpl. Spillan's seizure was reasonable.

is a question of fact that turns on an analysis of the totality of the circumstances. In *Schneckloth*, the Supreme Court adopted the test for voluntariness of a confession and applied it to the voluntariness of consent to search a vehicle, concluding that the issue is whether the defendant's will was overborne. *See id.* at 225-226.

In examining the totality of the circumstances, a court may consider the following factors, among others, (1) a defendant's age, education, and intelligence, (2) the degree to which the defendant cooperates with the police, (3) whether the defendant was advised of his constitutional rights and (4) whether any questioning or detention was repeated, prolonged, or prompted by physical punishment or coerced police behavior. *See id.* at 226-227; *Kim*, 27 F.3d at 955. The defendant need not be aware of his right to refuse permission to search in order to have his consent to the search deemed valid. *See Schneckloth*, 412 U.S. at 22-24. However, the defendant's awareness of his right to refuse may be considered as one of several factors in assessing the voluntariness of the accused's consent. *See id.*

It is uncontested that, at the time of the incident, Grey was in his late teens or early twenties,³² a native speaker of the English language who did not appear to have difficulty understanding or complying with the officers' requests, and had at least entered high school.³³ There is no evidence that Grey had any physical or mental deficiencies or that he was under the influence of any alcohol or drugs. Indeed, all of the officers' testimony supports this.

In his brief, Grey argues that he did not give free and voluntary consent since Cpl. Spillan

³²It appears that Grey is actually 22 years old.

³³Although the Government, states that the court does not have any evidence regarding Grey's educational background, the testimony at the evidentiary hearing demonstrated that Grey and Wright knew each other from high school.

“effectively told [him that] ‘you are free to leave after I look inside your bag.’” *See* Def. Ans. Br. at 13. Therefore, Grey contends, he was forced to submit to a show of Cpl. Spillan’s authority since he was “effectively forced” to remain by Cpl. Spillan’s side while the bag was searched. *See id* at 14. The totality of the circumstances, Grey concludes, show that there was no valid consent given to Cpl. Spillan’s to conduct a search.³⁴

The facts of the case, however, demonstrate otherwise. After placing Grey’s book bag on the trunk of the Taurus, Cpl. Spillan asked Grey if he “minded if I searched.” He did not say anything else to Grey to attempt to convince him to consent. There is no evidence in the record to suggest that Cpl. Spillan (1) used a hostile or threatening tone, (2) made any physical contact with Grey, or (3) had anything in his hand on the book bag at the time he requested consent. In response to Cpl. Spillan’s question, Grey stated that he “did not mind.” At the time Grey responded, he was not handcuffed or restrained in any way, both Tr. Simpler and Tr. Rentz were in their patrol cars, and Cpl. Spillan did not have a weapon (or anything else) in his hands. Grey appears to have released the book bag at the same time Cpl. Spillan grabbed it.

Once Cpl. Spillan obtained consent, his search of the book bag was extremely brief. Indeed, he merely unzipped the main compartment, looked inside, and saw the gun. Upon observing the weapon, Cpl.

³⁴Grey also appears to reargue Cpl. Spillan’s ability to grab the book bag from him as a factor to be examined in the “totality of the circumstances.” As he states in his brief, “it cannot be said that when a mere split second before grabbing the bag from Mr. Grey . . . there was so much occurring . . . to justify grabbing the bag from Mr. Grey.” *See id*. The court, however, has already concluded that the change in Grey’s demeanor – even if it occurred in a split second – was enough to warrant Cpl. Spillan’s seizure of the book bag. To the extent that Cpl. Spillan’s actions are relevant to the search, the court declines to find that they were sufficient to taint the validity of Grey’s consent.

Spillan did not search through the bag, nor look in the other compartments. Given the ease with which Cpl. Spillan found the weapon, it is reasonable to conclude that Grey knew it was in the bag and that Cpl. Spillan would likely discover it.

Given the above, the court finds that the totality of the circumstances demonstrate that Grey's consent was the product of a voluntary, free, and intelligent choice and that he was not coerced into granting Cpl. Spillan permission to search the book bag.³⁵ The court, therefore, will not suppress the gun found in the book bag.³⁶

IV. CONCLUSION

The court finds that Cpl. Spillan's seizure of Grey's book bag was justified by a reasonable articulable suspicion of criminal activity and that it was reasonably limited in scope and duration. Additionally, Grey voluntarily, knowingly and intelligently consented to Cpl. Spillan's search of the book bag. Thus, the court will deny Grey's motion to suppress. The court will issue an appropriate order in conjunction with this memorandum opinion.

³⁵During the interview at Troop 2, Grey admitted that he gave Cpl. Spillan permission to search the book bag. Although this statement is irrelevant for determining the validity of consent since it was made well after the search and during a police interrogation, it is noteworthy since it supports Cpl. Spillan's version of events.

³⁶In his initial omnibus motion, Grey sought to suppress the statements he made during his interview at Troop 2 and the 7.9 grams of crack cocaine recovered by the police officers. Grey, however, did not independently argue either of these points at the evidentiary hearing or in his brief in support of his motion. The court, therefore, declines to address whether Grey's statements or the inventory search of his book bag require suppression of the evidence. Rather, it is sufficient to note that the interrogation and the inventory search are not the "fruit of a poisonous tree" and should not be suppressed based on the events which transpired at the Arby's parking lot. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Crim.A.No. 00-82-GMS
v.)	
)	
DAMEON L. GREY,)	
)	
Defendant.)	
)	

ORDER

For the reasons stated in the court's Memorandum Opinion of the same date, IT IS HEREBY ORDERED that:

1. Grey's motion to suppress (D.I. 16) is DENIED.

Dated: August 23, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE