

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 16-218-12
MALIK MARTIN	:	

**MEMORANDUM**

**SURRICK, J.**

**AUGUST 7, 2018**

Presently before the Court are Defendant's Motion to Suppress Physical Evidence and Statements (ECF No. 618), Defendant's Supplemental Argument (ECF No. 650), and the Government's responses thereto (ECF Nos. 641, 655). For the following reasons, the Motion will be DENIED.

**I. BACKGROUND**

On August 9, 2017, a grand jury returned a Second Superseding Indictment (ECF No. 302) charging Defendant Malik Martin with conspiracy to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. Sections 846, 841(a)(1), (b)(1)(A) (Count One); and two counts of conspiracy to commit money laundering, in violation of 18 U.S.C. Sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) and (h) (Counts Nine and Ten).

Martin now moves to suppress physical evidence and statements from being introduced at trial, specifically \$22,850 in United States currency and statements made regarding drug purchases, all resulting from an encounter with Phoenix Police Detectives on August 12, 2005. Martin contends that the Detectives violated his Fourth Amendment rights.

**A. Procedural History**

Martin's Motion to Suppress was filed on March 19, 2018. (Def. Mot.) The Government filed a Response on April 19, 2018. (Gov't Resp., ECF No. 641.) On May 17, 2018, a hearing was held on the Motion. (May 17 Hr'g Tr. (on file with Court).) Martin filed a Supplemental Argument on May 18, 2018. (Def. Supp. Arg.) The Government filed a Response to the Supplemental Argument on May 25, 2018. (Gov't Resp. Supp., ECF No. 655.)

**B. Findings of Fact**

On August 12, 2005, Detectives Timothy Burk and Michael Oolman of the Phoenix Police Department were on duty working airport narcotics interdiction at Sky Harbor Airport in Phoenix, Arizona. (Hr'g Tr. 12-13.) The detectives had received information that two passengers traveling on American West Flight 807 incoming from Philadelphia had purchased their tickets the day before the flight, with cash, minutes apart from each other and from the same travel agency. (*Id.* at 14, 22; Gov't Resp. 3.) The two passengers had checked in at the same time, they were seated very near each other on the plane, and both had purchased roundtrip tickets scheduled to return the next day. (*Id.*) Detective Burk testified that based upon his years of experience as a narcotics officer, these facts, in conjunction with the fact that Phoenix is considered a "source location" for illegal drugs due to its proximity to the Mexican border, and the fact that Philadelphia is known as a "[d]emand" city from which drug traffickers travel to Phoenix to purchase illegal drugs, led Burk and Oolman to investigate further. (Hr'g Tr. 14-15.)

The detectives knew the names of the two passengers and that they were sitting in the front of the plane, but they did not have any photographs of the two men. (*Id.* at 22-24.) The detectives therefore stood near the gate and watched as passengers exited the plane, looking for any suspicious or out of the ordinary behavior. (*Id.* at 15, 23.) The detectives observed most of

the passengers move out into the boarding area and engage in typical passenger behavior, *e.g.*, looking around for the baggage claim sign and walking toward the baggage area or looking at the airport monitors for flight information. (*Id.* at 23.) Two of the passengers exhibited different behavior that drew the attention of the detectives. (*Id.*) One man exited the plane and remained in the boarding area looking back toward the plane as if waiting for someone else to exit. (*Id.* at 15.) Another man then exited the plane pulling a “pull-type bag” and approached the first man. (*Id.*) They briefly spoke to each other, and the second man then handed the first his bag. (*Id.*) The two men then left the boarding area and began to walk down the concourse. (*Id.*) At this point, Burk and Oolman decided to attempt to speak to the two men. (*Id.*)

The detectives followed the men from behind. (*Id.* at 16.) Oolman approached and began to speak to one of the men, later identified as Jerome Woods. (*Id.*; Gov’t Resp. 2 n.2.) The other man glanced back and saw that Woods had stopped to speak with Oolman, and then kept walking. (Hr’g Tr. 16.) Detective Burk went ahead and approached the other man, who would soon be identified as the Defendant, Malik Martin. (*Id.*)

Detective Burk came up to Martin on his right side. (*Id.*) Burk was dressed in civilian clothes and his gun was hidden on his person. (*Id.* at 14, 25.) Burk introduced himself to Martin, stated that he was a Phoenix police officer working with the airport narcotics interdiction unit, showed him his badge, and said he wanted to briefly speak with Martin and ask him a few questions. (*Id.* at 16, 24-26.) Martin initially said he was waiting for someone, but then agreed to speak with Burk after he was assured it would only take a few moments. (*Id.* at 16.)

Detective Burk first verified that Martin had just flown in to Phoenix. (*Id.*) Burk asked him if he had an airline ticket. (*Id.*) Martin did not produce a ticket but he did show Burk his Philadelphia driver’s license. (*Id.*) Burk took the license, looked to see if the photo on the

license matched Martin's face (which it did), learned his name from the license, and then gave the license back to Martin. (*Id.*) Burk asked Martin if he was flying alone, and Martin refused to answer that question. (*Id.* at 17.) Burk asked Martin why he had come to Phoenix and for how long, and Martin answered that he was there to see his girlfriend and didn't know how long he would be there. (*Id.*) Martin also told Burk that he had purchased a roundtrip ticket, with cash, scheduled to return to Philadelphia the following day. (*Id.*)

At some point during this interaction another detective joined Burk. (*Id.* at 18.) Burk asked Martin if he was travelling with any contraband, to which Martin replied no. (*Id.*) Burk asked if he could search Martin's bag, Martin said yes, and the other detective with Burk searched the bag and found nothing notable. (*Id.*) Burk then asked Martin if he was travelling with any contraband or large amounts of currency on his person. (*Id.*) Martin said that he was, and he allowed Burk to search him. (*Id.*) Burk found rubber-banded bundles of what appeared to be a large amount of United States currency in both of Martin's front pockets. (*Id.*) Martin said the money had come from his construction job and that it was about \$8,000. (*Id.* at 18-19.) Before Detective Burk found this money on Martin, he had spoken to Detective Oolman and learned that Woods also had a similar amount of cash on him. (*Id.* at 19.) Based on the circumstances of Martin's and Woods' travel, Martin's answers to Burk's questions, and the large amount of cash found on the two men, Burk suspected Martin was engaged in criminal activity and should be detained for further investigation. (*Id.* at 19.)

Burk testified that up to this point, Martin had been free to leave. (*Id.* at 16.) Burk stayed on Martin's right side during the encounter, never standing in front of him or in any way blocking his path, leaving Martin a "clear path of egress" to walk away at any time. (*Id.*) Burk also told Martin he was not under arrest during the encounter. (*Id.* at 25.) Burk never informed

Martin that he did *not* have to answer his questions, but when Martin refused to answer some of Burk's questions, Burk did not demand answers. (*Id.* at 25, 31.) However, once Detective Burk asked Martin to go with him to the Phoenix Police Department's security office in the airport, Martin was no longer free to leave. (*Id.* at 19, 28.)

Martin was taken to the security office, a fifteen-by-ten-foot room with chairs, tables, and filing cabinets. (*Id.* at 30-31.) Detectives Burk and Oolman were in the room with Martin, as well as a K-9 handler and Burk's supervisor. (*Id.* at 30.) Burk read Martin the *Miranda* warnings, and Martin agreed to waive his *Miranda* rights. (*Id.* at 19-20.) Burk then asked Martin many of the same questions he had asked him before, about why he had flown to Phoenix, how long he planned to stay, and how he had purchased his ticket. (*Id.* at 20.) Martin gave essentially the same answers as before, but this time Burk told Martin that he didn't believe that those answers were truthful. (*Id.*) Martin then changed his answers and said that he had flown to Phoenix to sample marijuana for purchase and to buy as much as he could with the cash he had brought. (*Id.*) He also admitted that he knew and was travelling with Woods, after initially denying it, once Burk informed Martin that he had seen Martin carrying Woods' bag. (*Id.*)

The money found on Martin was examined for narcotics by a K-9. (*Id.* at 21.) The K-9 positively alerted that the cash had a narcotics odor. (*Id.* at 21.) The cash was counted by Burk's supervisor, and it amounted to \$22,850, not \$8,000 as Martin originally had claimed. (*Id.* at 19.) The money was then placed in an evidence envelope, Martin was provided with a receipt, and he was then released.

## II. DISCUSSION

Martin argues that he was seized by the interdiction agents because they had pre-determined, based on the information they had received regarding the purchase of the tickets, that they were going to approach Martin, question him, and not let him leave, and so Martin was never actually free to leave. Therefore, the entire encounter, including the search of Martin's bag and pockets, was not consensual and the money should be suppressed. Martin further argues that this seizure was illegal because the agents lacked reasonable suspicion or probable cause to detain him in the concourse and in the security office, and therefore any evidence which resulted from this illegal seizure, including the statements made by Martin in the security office, are fruit of the poisonous tree and should be suppressed as well.

### A. **The Initial Encounter Between Martin and Detective Burk Was Consensual and Was Not a Seizure**

1. *Martin was only "seized" by Detective Burk at the point where Martin was made to go to the security office.*

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also United States v. Ubiles*, 224 F.3d 213, 216 (3d Cir. 2000). "A seizure occurs when there is either (a) a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful, or (b) submission to a show of authority." *United States v. Jackson*, 575 Fed. App'x 59, 62 (3d Cir. 2014) (quoting *United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006)). "The test for existence of a show of authority is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Id.* (internal quotations omitted). A seizure does not occur "simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel

free to disregard the police and go about his business, the encounter is consensual . . . [and] will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citations omitted). Similarly, the Supreme Court has held that the Fourth Amendment “permits police officers to approach individuals in airport lobbies to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. *See Bostick*, 501 U.S. at 434-35 (discussing cases).

In *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), the Supreme Court provided a non-exhaustive list of examples of “circumstances that might indicate a seizure.” These include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Id.*

In *Mendenhall*, DEA agents working at the Detroit Airport as part of the narcotics interdiction unit observed the defendant acting in a way that suggested she was trafficking drugs. *Id.* at 547. The agents approached her as she was walking through the concourse, identified themselves as federal agents, asked to see her identification and airline ticket, noticed a discrepancy between the names listed on each, asked her some questions about that discrepancy and the circumstances of her flight and travel plans, and then returned her ticket and license. *Id.* at 547-48. The agents were not wearing uniforms, not displaying any weapons, did not summon her to them but instead approached her in the public concourse and identified themselves as federal agents, and requested but did not demand to see her ticket and identification. *Id.* at 555. Based on these facts, the Court held that no seizure of the defendant had occurred, because she

had no objective reason to believe she was not free to end the conversation in the concourse and proceed on her way. *Id.*

The result in *Mendenhall* was not affected by the fact that the agents never expressly told the defendant that she was “free to decline to cooperate with their inquiry,” because “the voluntariness of her responses [did] not depend upon her having been so informed.” *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)); see also *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (noting that officers do not violate the Fourth Amendment by merely approaching individuals in public spaces, identifying themselves as law enforcement, and asking if they are willing to answer some questions); *United States v. Hammonds*, 572 Fed. App’x 126, 131 n.8 (3d Cir. 2014) (holding that airport encounter with DEA agents was consensual where, *inter alia*, agents only took possession of defendant’s ticket and license for brief period of time to copy those documents, defendant was not handcuffed, and agents did not display weapons).

Here, Detective Burk’s encounter with Martin did not amount to a constitutional seizure until the point where Burk told Martin he would have to accompany him to the Police Department’s security office. Until then, a reasonable person in Martin’s position would have understood that he was free to refuse to answer Burk’s questions and could leave to go about his business. Martin was approached in a public space, Burk immediately identified himself and his mission, displayed no weapon, wore civilian clothes, never commanded that Martin engage with him (in fact, Martin refused to answer some questions and Burk did not demand answers to those), and never touched Martin until he asked and was given consent to do so. Burk conveyed through his body language and location relative to Martin that Martin was free to leave at any point. In addition, although Burk asked to see Martin’s airline ticket and driver’s license, when Martin did give Burk his license, Burk examined it quickly and immediately returned it to

Martin. It is irrelevant that Burk had pre-determined that he was going to question Martin. Regardless of Burk's intent, based on these facts, an objectively reasonable person in Martin's position would have understood that he was free to leave.

We understand that being stopped by a law enforcement officer is anxiety producing. However, the analysis here is the result of an ongoing process of weighing Fourth Amendment interests against law enforcement's duties. *See, e.g., Mendenhall*, 446 U.S. at 554 (noting the Court's hesitation to characterize every encounter between citizens and police as a seizure to avoid imposing "unrealistic restrictions upon . . . legitimate law enforcement practices"). Balancing the circumstances here, we conclude that Martin was objectively free to leave, and thus was not seized by Burk until he was made to accompany Burk to the security office.

2. *Martin legally consented to allow Detective Burk to search his bag and pockets.*

"While the Fourth Amendment prohibits unreasonable searches and seizures, consent is an exception to the requirements of both a warrant and probable cause." *United States v. Murray*, 821 F.3d 386, 391 (3d Cir. 2016) (citation and quotation omitted). "Consent . . . is a question of fact determined from the totality of the circumstances." *United States v. Sempf*, 649 Fed. App'x 270, 271(3d Cir. 2016) (citation omitted). Therefore, "the ultimate test of voluntariness is whether, under the circumstances, the consent was an exercise of free will or whether the actor's free will has been overborn and his capacity for self-determination critically impaired." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)). To justify a search based on consent, the Government bears the burden of proving that the consent was given freely and voluntarily. *United States v. Price*, 558 F.3d 270, 277-78 (3d Cir. 2009) (citation omitted).

Courts often consider the alleged consent-giver's age, intelligence, whether he was advised of his constitutional rights, the length of the encounter, the repetition or duration of the questioning, the nature of the setting in which the consent was obtained, and the parties' verbal and non-verbal actions. *Id.* at 278. (citations omitted).

Considering the totality of the circumstances here, Martin freely and voluntarily gave consent to Detective Burk to allow his bag and pockets to be searched. Our analysis is essentially the same as our analysis of whether the encounter was a seizure. Martin was approached by a plain clothes officer, whose gun was not visible, and who identified himself and his mission from the outset of their conversation. Martin was not told that he was free to leave, but neither was he told he had to stay, and Burk's deference to Martin's refusal to answer certain questions, his leaving Martin a clear path of exit, and the fact that they were in a public space, all contributed to an overall conclusion that Martin was objectively free to leave at any time. Therefore, when Detective Burk asked, but did not demand, if he could search Martin's bag and then his pockets, Martin was free to refuse. Again, we understand that it is not easy to say no to a police officer, but under the totality of the circumstances, Martin was in a position to say no, and instead he freely and voluntarily gave his consent to Detective Burk. *See, e.g., Mendenhall*, 446 U.S. at 558-59 (holding that consent was freely given by defendant after she was asked by airport interdiction agents to go back to security office, was advised of her right to refuse search of her bag, then gave consent to search her bag, which did contain narcotics; and noting that validity of consent is not predicated on whether it was in her self-interest, but whether she acted voluntarily); *Hammonds*, 572 Fed. App'x at 132 (holding that defendant's consent to a search was freely given, even though it was given in the DEA agents' airport office, after he had spoken

with them in the airport concourse, and after they had made copies of his travel and identification documents).

**B. The Officers Had Reasonable Suspicion to Detain Martin in the Security Office**

Reasonable suspicion is an objective standard based on the totality of the facts and circumstances. *United States v. Mathurin*, 561 F.3d 170, 174 (3d Cir. 2009). It requires a police officer to point to “specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968). It must be based on “something more substantial than an ‘inchoate and unparticularized suspicion or hunch.’” *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003) (quoting *Terry*, 392 U.S. at 27). “The principal components of a determination of reasonable suspicion . . . will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion . . .” *Mathurin*, 561 F.3d at 174 (3d Cir. 2009) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). “Though the individual factors giving rise to reasonable suspicion may be innocent in isolation, together they must serve to eliminate a substantial portion of innocent travelers.” *Id.* (internal quotation omitted).

In *United States v. Hammonds*, the Third Circuit held that DEA agents working airport interdiction in Puerto Rico had reasonable suspicion to detain a suspected drug trafficker based on information the agents had received about the defendant and on their observations of his behavior in the airport. 572 Fed. App’x at 131-32. When the agents decided to take the defendant from the public concourse to the DEA office, the agents had learned that: the defendant had flown into Puerto Rico, a known source city, from within the continental United States, where you can return without going through customs; the defendant and his traveling

companions were all carrying large sums of cash on their person or in their luggage, and; the defendant approached the agents on his own volition after he saw that they were speaking to his traveling companions. *Id.* The court held that these facts supported a finding of reasonable suspicion justifying the agents' decision to bring the defendant back to their office for further investigation. *Id.*

We are satisfied that Detective Burk pointed to sufficient specific articulable facts which, taken together with the rational inferences to be drawn from those facts, reasonably warranted detaining Martin and bringing him back to the Police Department's security office within the airport for further investigation. Detective Burk, an experienced interdiction officer, testified that the circumstances of Martin's and Woods' ticket purchases were typical of drug traffickers. Along with their behavior at the gate – waiting for each other and handing the bag off – and their particularly suspicious behavior on the concourse, *i.e.*, seeing that your traveling companion has just been stopped by a random person and continuing on as if nothing happened, Martin's somewhat evasive answers to Burk's questions, and of course the large amounts of cash found on both Martin and Woods, Detective Burk had observed sufficient facts to believe Martin was engaged in criminal activity. Detective Burk's decision to detain Martin and bring him to the security office was justified by an objectively reasonable suspicion and therefore lawful under the Fourth Amendment.<sup>1</sup>

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<sup>1</sup> Martin filed a Supplemental Argument following the hearing on the Motion to Suppress Physical Evidence and Statements, arguing that because Detective Burk did not make an in-court identification of Martin during the hearing as the man that he stopped at the Phoenix airport, the Government had failed to meet its burden. (Def. Supp. Arg.) Initially we note that in his Motion to Suppress Martin stated, "On August 12, 2005 at 12:20 p.m., Malik Martin landed at the Phoenix Sky Harbor International Airport in Phoenix, Arizona along with Jerome Woods. They were immediately stopped by law enforcement. . . . When they exited the plane, they were immediately stopped by TFA Colman [sic] and Detective Burk." In addition, during the suppression hearing, Detective Burk testified that Malik Martin showed him a driver's license

**C. Martin Validly Waived His *Miranda* Rights**

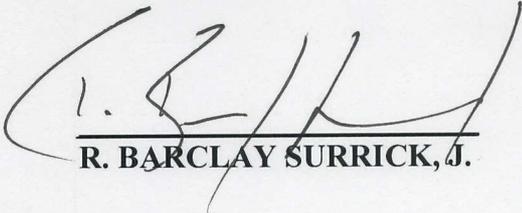
Martin does not dispute that he was properly *Mirandized* and waived those rights. He instead argues that he was detained, stopped, and/or arrested without reasonable suspicion or probable cause, and as a result, regardless of the fact that he waived his *Miranda* rights, any statements made either pre- or post-*Miranda* warnings should be suppressed as the fruit of the illegal seizure.

As discussed above, the initial encounter between Detective Burk and Martin did not amount to a seizure, and Detective Burk did have reasonable suspicion to detain Martin and bring him to the security office, where he was informed of and then waived his *Miranda* rights. Therefore, the statements made by Martin, both during the encounter with Detective Burk and after he was *Mirandized* in the security office, will not be suppressed.

**IV. CONCLUSION**

For these reasons, Defendant's Motion to Suppress Physical Evidence and Statements will be denied. An appropriate Order follows.

**BY THE COURT:**



**R. BARCLAY SURRECK, J.**

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which had Martin's name on it. Burk testified that the person he had stopped and talked to was the same person whose picture was on the license. Defense counsel also referred to the man stopped by Burk as "Mr. Martin" during the hearing. (*See, e.g.*, Hr.'g Tr. 24-26.) In any event, the purpose of the suppression hearing was to determine whether the constitutional rights of the person stopped at the Phoenix airport were violated and whether evidence taken from that person is subject to the exclusionary rule. At trial, the Government will have to lay a foundation for the evidence and tie it to Martin. Of course, Martin can always argue that he was not the man at the Phoenix airport who was stopped by Detective Burk.

IN THE UNITED STATES DISTRICT COURT  
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MALIK MARTIN

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CRIMINAL ACTION

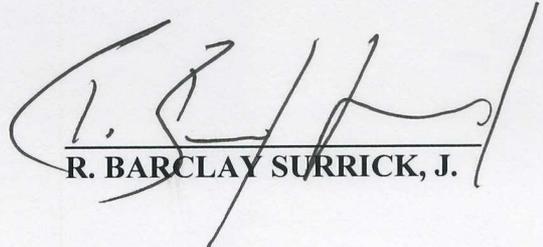
NO. 16-218-12

**ORDER**

AND NOW, this 7<sup>th</sup> day of August, 2018, upon consideration of Defendant's Motion to Suppress Physical Evidence and Statements (ECF No. 618) and Supplemental Argument (ECF No. 650), and all documents submitted in support thereof and in opposition thereto, and after a hearing in open Court, it is **ORDERED** that the Motion is **DENIED**.

**IT IS SO ORDERED.**

**BY THE COURT:**

  
**R. BARCLAY SURRECK, J.**