

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 11, 2007

Decided: July 23, 2007)

Docket No. 06-4265-cr

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UNITED STATES OF AMERICA,

Appellee,

-v.-

JEROME K. BALDWIN, also known as Jerome
Baldwin, also known as Brucey B,

Defendant-Appellant.

- - - - -x

Before: JACOBS, Chief Judge, WESLEY and GIBSON,*
Circuit Judges.

Appeal from a judgment of conviction entered in the
District Court for the District of Connecticut (Dorsey, J.).

AFFIRMED.

DEIRDRE A. MURRAY, Assistant
Federal Public Defender (Paul F.
Thomas, on the brief), for
Thomas G. Dennis, Federal Public

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

1 Defender, New Haven, CT, for
2 Defendant-Appellant.**

3
4 ERIC J. GLOVER, Assistant United
5 States Attorney (William J.
6 Nardini, on the brief), for
7 Kevin J. O'Connor, United States
8 Attorney, District of
9 Connecticut, for Appellee.

10
11 DENNIS JACOBS, Chief Judge:

12 When a driver heeds a police order to stop only to
13 drive away as the police approach, has the driver been
14 seized within the meaning of the Fourth Amendment? We hold
15 that a seizure requires submission to police authority, and
16 conclude that the driver's initial fleeting stop does not
17 amount to such submission. We therefore affirm the denial
18 of the driver's motion to suppress evidence found on his
19 person and in his car, and affirm the conviction entered in
20 the District Court for the District of Connecticut (Dorsey,
21 J.).

22
23
24 **I**

** After this appeal was fully briefed, the defendant sent the federal public defender a letter which he insisted be read during the defendant's allotted time for oral argument. Counsel then moved to withdraw. We granted the motion and took defendant's letter on submission.

1 On the afternoon of September 4, 2005, an anonymous
2 caller told the New Haven police that two black men, one
3 wearing a white t-shirt, were carrying firearms. The caller
4 reported that they were standing next to a grey or silver
5 Chevrolet Impala with Virginia license plates, parked on
6 Downing Street, near an intersection with Bailey Street.
7 The location is adjacent to the Quinnipiac Terrace housing
8 complex, which has been plagued by the sale of guns and
9 illicit drugs. According to the tipster, the men had "big
10 guns, real real big guns, serious."

11 Police officers Plowman and Donnelly found no one at
12 the reported location; but as they drove along Downing
13 Street, they saw a grey car oncoming which had no front
14 license plate. As it approached, the officers observed that
15 the driver was a black man (later identified as Jerome
16 Baldwin) wearing a black t-shirt, but could not see any
17 passengers. As the car passed, the officers identified it
18 as a silver 2001 Chevrolet Impala bearing a Virginia license
19 plate on the rear; they turned on their overhead lights and
20 siren and pursued.

21 The Impala stopped after turning left onto Bailey
22 Street and the marked patrol car pulled up behind it. As

1 Plowman and Donnelly approached the Impala on foot, the
2 driver (Baldwin) leaned out the window and peered back at
3 them. Plowman instructed Baldwin to show his hands, but he
4 simply stared back and refused to comply. The officers
5 twice repeated the order and, with Baldwin still non-
6 compliant, drew their weapons. As Donnelly approached the
7 Impala's passenger side to determine whether any one else
8 was inside, the car sped off.

9 In the chase that ensued, Baldwin broke an untold
10 number of traffic laws and narrowly averted multiple serious
11 accidents. As Baldwin attempted to negotiate a right turn
12 at the bottom of an exit ramp, his car jumped the curb and
13 slammed into an embankment. At that point, a black man
14 wearing a white t-shirt opened the passenger door and fled
15 on foot; he was never apprehended. Baldwin ran back onto
16 the highway and jumped off an overpass, but was eventually
17 stopped by other officers who had joined the pursuit.
18 Baldwin was handcuffed and taken via patrol car to Plowman
19 and Donnelly, who identified him as the driver of the
20 Impala.

21 A search of Baldwin's person incident to his arrest
22 yielded a black mask, a wallet containing a Virginia

1 driver's license in his name, and a note which read, "Hi-
2 Point Mansfield-Ohio, Model C, 9MM, 9MM Ammunition too."
3 One of the arresting officers recognized Baldwin as a member
4 of the Island Brothers gang, known to infest Quinnipiac
5 Terrace.

6 A large machine pistol (later determined to have a
7 round in the chamber) was lying on the front passenger floor
8 of the Impala. A search of the car's interior yielded
9 ammunition and a speed loader for the pistol; a Savage 20
10 gauge pump-action shotgun; and a Hi-point 9MM semiautomatic
11 handgun matching the description in the note found in
12 Baldwin's wallet. The search also yielded drug
13 paraphernalia: small plastic bags of crack cocaine, a
14 balance scale, a digital scale, and a cutting agent. The
15 Impala was registered to Baldwin.

16 Baldwin was indicted on three counts: (1) being a felon
17 in possession of a firearm (18 U.S.C. § 922(g)(1)); (2)
18 possession with intent to distribute five grams or more of
19 cocaine base (21 U.S.C. § 841(a)(1), (b)(1)(B)); and (3)
20 using and possessing a firearm during, in relation to, and
21 in furtherance of a drug trafficking crime (18 U.S.C. §
22 924(c)(1)). Baldwin moved to suppress the evidence

1 recovered from his person and his vehicle on the ground that
2 officers Plowman and Donnelly lacked reasonable suspicion
3 when they initially ordered him to stop. The government
4 responded that, by speeding away, Baldwin had disobeyed that
5 order and therefore had not been seized. Alternatively, the
6 government argued that the order to stop was supported by
7 reasonable suspicion.¹

8 The district court denied Baldwin's motion on April 7,
9 2006, reasoning that

10 [r]egardless of what Baldwin's initial motivations were
11 in pulling over his car, he never submitted to the
12 officers' show of authority and therefore was never
13 seized. . . .

14 . . . Baldwin's pre-seizure behavior--including
15 fleeing from police, the operation of his vehicle,
16 crashing his vehicle and running away on foot--
17 generated reasonable suspicion for his ultimate
18 apprehension.
19

20
21 United States v. Baldwin, No. 05 Cr. 291, 2006 WL 923721,
22 *3-*4 (D. Conn. Apr. 7, 2006). The district court thus had
23 no occasion to decide whether the initial order to stop was
24 lawful.

25 Baldwin entered a conditional plea of guilty to the
26 second and third counts of the indictment, reserving the

¹ On this appeal, the government takes no position on the lawfulness of the initial order to stop.

1 right to appeal the district court's denial of the motion to
2 suppress. He was sentenced principally to 120 months'
3 imprisonment on the second count and 60 months on the third,
4 the sentences to run consecutively.

5 This appeal is taken only from the denial of the motion
6 to suppress. Where, as here, the district court's ruling
7 "turned on the legal question of when [the defendant] was
8 seized, we review the decision de novo." United States v.
9 Swindle, 407 F.3d 562, 566 (2d Cir. 2005).

11 II

12 Baldwin argues that he was seized as soon as he pulled
13 to a stop in response to the patrol car's overhead lights
14 and siren, that this seizure was unlawful when made, and
15 that his subsequent flight did not render the seizure lawful
16 retroactively.

17 The government argues that Baldwin's position has
18 already been rejected by the Supreme Court in California v.
19 Hodari D., which held that a seizure requires "either
20 physical force . . . or, where that is absent, submission to
21 the assertion of authority." 499 U.S. 621, 626 (1991). We
22 have understood the import of Hodari D. to be that "an order

1 to stop must be obeyed or enforced physically to constitute
2 a seizure." Swindle, 407 F.3d at 572. Baldwin agrees that
3 Hodari D. and Swindle control, but argues that he obeyed the
4 order to stop when he stopped, albeit temporarily.

5 We hold that, to comply with an order to stop--and thus
6 to become seized--a suspect must do more than halt
7 temporarily; he must submit to police authority, for "there
8 is no seizure without actual submission," Brendlin v.
9 California, 127 S. Ct. 2400, 2405 (2007). Several circuits
10 have said as much. See United States v. Washington, 12 F.3d
11 1128, 1132 (D.C. Cir. 1994) ("[Defendant] initially stopped,
12 but he drove off quickly before Officer Hemphill even
13 reached the car. Because [defendant] did not submit to
14 Hemphill's order, he was not seized"); see also
15 United States v. Valentine, 232 F.3d 350, 359 (3d Cir. 2000)
16 ("Even if Valentine paused for a few moments and gave his
17 name, he did not submit in any realistic sense to the
18 officers' show of authority, and therefore there was no
19 seizure until Officer Woodard grabbed him."); United States
20 v. Hernandez, 27 F.3d 1403, 1407 (9th Cir. 1994) ("Hernandez
21 requests we find he submitted to authority and was seized,
22 despite his subsequent flight, merely because he hesitated

1 for a moment and made direct eye contact with Sadar. We
2 decline to hold these actions sufficient to constitute
3 submission to authority."). Arguably to the contrary is
4 United States v. Morgan, 936 F.2d 1561, 1567 (10th Cir.
5 1991) ("[S]ince Officer Eubanks had followed the car in
6 which Defendant was a passenger for several blocks with his
7 red lights flashing; since Officer Eubanks exited from a
8 marked police car, in uniform, and asked the Defendant to
9 hold up; and since Defendant, at least momentarily, yielded
10 to the Officer's apparent show of authority, we find Mr.
11 Morgan was seized for purposes of the Fourth Amendment . . .
12 ."), but for the reasons that follow, we decline to adopt
13 the reasoning of Morgan.

14 Whether conduct constitutes submission to police
15 authority will depend, as does much of the Fourth Amendment
16 analysis, on "the totality of the circumstances--the whole
17 picture." United States v. Cortez, 449 U.S. 411, 417
18 (1981); see also Brendlin, 127 S. Ct. at 2409 ("[W]hat may
19 amount to submission depends on what a person was doing
20 before the show of authority: a fleeing man is not seized
21 until he is physically overpowered, but one sitting in a
22 chair may submit to authority by not getting up to run

1 away." Baldwin's conduct, all circumstances considered,
2 amounted to evasion of police authority, not submission.
3 Cf. Hernandez, 27 F.3d at 1407 ("We decline to adopt a rule
4 whereby momentary hesitation and direct eye contact prior to
5 flight constitute submission to a show of authority.");
6 United States v. Lender, 985 F.2d 151, 155 (4th Cir. 1993)
7 ("Defendant asks us to characterize as capitulation conduct
8 that is fully consistent with preparation to whirl and shoot
9 the officers.").

10 Baldwin argues that he was seized at the moment he
11 pulled over because "a reasonable person would have believed
12 that he was not free to leave." United States v.
13 Mendenhall, 446 U.S. 544, 554 (1980). But this objective
14 requirement "states a necessary, but not a sufficient,
15 condition for seizure," Hodari D., 499 U.S. at 628; see also
16 United States v. Sealey, 30 F.3d 7, 10 (1st Cir. 1994). A
17 reasonable person standing in Baldwin's place would have
18 felt bound to stop, and having stopped and stayed, would be
19 able to argue suppression on the ground of a baseless
20 seizure. See Swindle, 407 F.3d at 572 ("Merely feeling
21 restrained is not enough . . ."); Washington, 12 F.3d at
22 1132 ("Although a reasonable person would not have believed

1 that she was free to continue driving once Officer Hemphill
2 activated his sirens and ordered the Mazda's driver to stop,
3 [defendant] did not in fact submit to the officer's
4 order.").²

5 Our ruling is not predicated on the brevity of
6 Baldwin's stop, but on the fact that the stop itself did not
7 constitute submission. In other words, it is the nature of
8 the interaction, and not its length, that matters. See
9 Delaware v. Prouse, 440 U.S. 648, 655 (1979) ("[S]topping an
10 automobile and detaining its occupants constitute a
11 'seizure' . . . even though the purpose of the stop is
12 limited and the resulting detention quite brief."). Because
13 Baldwin's momentary stop did not constitute submission to
14 police authority, he had not been seized within the meaning
15 of the Fourth Amendment.
16

² Baldwin cites United States v. Coggins for the proposition that flight after seizure does not preclude a finding of seizure. See 986 F.2d 651, 654 (3d Cir. 1993) ("Even though he fled soon thereafter, the combination of Coggins' expressed desire to leave, Agent Inouye's order that he stay, and Coggins' yielding to police authority resulted in a seizure for purposes of the Fourth Amendment"). Because we conclude that Baldwin had not been seized by the time he fled, we have no occasion to decide whether or to what extent the reasoning of Coggins would apply.

1 **III**

2 We are left to determine the validity of the seizure of
3 evidence from Baldwin's car and person at the end of the car
4 chase.

5 The district court concluded that "Baldwin's pre-
6 seizure behavior--including fleeing from police, the
7 operation of his vehicle, crashing his vehicle and running
8 away on foot--generated reasonable suspicion for his
9 ultimate apprehension." Baldwin, 2006 WL 923721, *4. We
10 frame the issue differently: because Baldwin's ultimate
11 seizure was an arrest,³ the question is one of probable
12 cause. See Maryland v. Pringle, 540 U.S. 366, 370 (2003)
13 ("A warrantless arrest of an individual in a public place
14 for a felony, or a misdemeanor committed in the officer's
15 presence, is consistent with the Fourth Amendment if the
16 arrest is supported by probable cause."). For the reasons
17 articulated by the district court, we conclude that the
18 arrest was supported by probable cause and that the evidence

³ The government's brief says that the search of Baldwin was done "incident to arrest," thereby conceding that his seizure constituted an arrest and required probable cause.

1 resulting therefrom was properly admitted.⁴

2 Baldwin argues, however, that his seizure cannot be
3 justified by events that unfolded after an order to stop
4 that, as he contends and as the government implicitly
5 concedes for present purposes, was not based on reasonable
6 suspicion, let alone probable cause. Baldwin relies chiefly
7 on United States v. Swindle, which observed in dicta that
8 "if subsequent incriminating events cannot justify an
9 unreasonable stop, then it logically follows that subsequent
10 incriminating events should not be able to justify an
11 unreasonable order to stop." 407 F.3d at 568. However, the
12 holding of Swindle was that Supreme Court precedent has
13 "implicitly authorized a defendant's seizure based on events
14 occurring after issuance of an unreasonable order to stop."
15 Id. We have since reaffirmed our adherence to this implicit
16 rule:

17 An individual approached by an officer who has no
18 reasonable suspicion of wrongdoing may ignore the
19 officer and go about his business, and his refusal
20 to cooperate may not form the basis for his
21 detention. See Florida v. Royer, 460 U.S. 491,
22 498 (1983). "But unprovoked flight is simply not

⁴ At oral argument, the government argued for the first time that the search of Baldwin's car was justified on the theory of abandonment. Because we conclude that the police had probable cause to arrest Baldwin, we need not consider this alternative basis for the search of his car.

1 a mere refusal to cooperate. Flight, by its very
2 nature, is not 'going about one's business'; in
3 fact, it is just the opposite." Illinois v.
4 Wardlow, 528 U.S. 119, 125 (2000).

5 United States v. Muhammad, 463 F.3d 115, 123 (2d Cir. 2006).

6 We acknowledge that this rule could create an incentive for
7 the police to issue unreasonable orders to stop in the hopes
8 of creating reasonable suspicion or probable cause. But as
9 the Supreme Court has pointed out,

10 [u]nlawful orders will not be deterred . . . by
11 sanctioning through the exclusionary rule those of them
12 that are not obeyed. Since policemen do not command
13 "Stop!" expecting to be ignored, or give chase hoping
14 to be outrun, it fully suffices to apply the deterrent
15 to their genuine, successful seizures.

16
17 Hodari D., 499 U.S. at 627.

18
19 * * *

20 For the foregoing reasons, the judgment of the district
21 court is affirmed.