IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 30, 2020

Lyle W. Cayce
Clerk

No. 19-30862
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DORIAN ARNELL FERGUSON,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:18-CR-302-1

Before HIGGINBOTHAM, HO and ENGELHARDT, Circuit Judges.

PER CURIAM:[*]

Dorian Arnell Ferguson appeals his conviction following a conditional guilty plea to illegally possessing a firearm after a felony conviction. *See* FED. R. CRIM. P. 11(a)(2). Ferguson contests the district court's denial of his motion to suppress his incriminating post-arrest statement to federal agents. Specifically, Ferguson argues that his post-arrest statement was inadmissible under the fruit-of-the-poisonous-tree doctrine because it resulted from a police

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

officer's unconstitutional attempt to seize him after misidentifying him as Markale Thibeaux, who was wanted for attempted murder.

The Fourth Amendment, which is made applicable to state action by the Fourteenth Amendment, prohibits unreasonable searches and seizures. U.S. CONST. amend. IV, XIV. A warrantless seizure is per se unreasonable unless it falls within one of a few carefully defined exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception applies to brief investigatory stops based on reasonable suspicion, grounded in specific and articulable facts, that the person may be engaged in criminal activity or is wanted in connection with a completed felony. *United States v. Hensley*, 469 U.S. 221, 229 (1985); *see Terry v. Ohio*, 392 U.S. 1, 20-22 (1968). The typical remedy for Fourth Amendment violations is the suppression of any resulting evidence at trial. *United States v. Mendez*, 885 F.3d 899, 909 (5th Cir. 2018). Even evidence indirectly derived from a Fourth Amendment violation may be suppressed as the fruit of the poisonous tree. *Id.*

The Fourth Amendment's protections apply to seizures of the person, which occur when a law enforcement officer restrains a person's liberty by means of either physical force or a show of authority. *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991). In *Hodari D.*, *id.* at 626, the Supreme Court clarified that there is no seizure where the subject does not submit to a show of police authority; in that circumstance, the person is not seized until he is successfully stopped. Thus, just as the juvenile who ran at the sight of approaching police in *Hodari D., id.* at 622-23, 629, Ferguson, who fled in response to a police command to place his hands in the air, was not seized at any point prior to his post-flight physical apprehension. Significantly, Ferguson has abandoned any challenge to his post-flight detention and arrest

by failing to raise such arguments in this appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

In any event, even if it is assumed arguendo that an attempted seizure could in fact trigger the Fourth Amendment, Ferguson has failed to show that the attempt to detain him for an investigatory *Terry* stop was not supported by reasonable suspicion. *See Hensley*, 469 U.S. at 229. The district court made a factual finding that the police officer's mistaken identification of Ferguson as Thibeaux was reasonable, and Ferguson has failed to show that the district court's account of the evidence was so implausible as to be clearly erroneous. *See United States v. Smith*, 952 F.3d 642, 646 (5th Cir. 2020); *United States v. Fidse*, 862 F.3d 516, 523 (5th Cir. 2017). The district court did not err in concluding that this reasonable though mistaken identification of Ferguson as Thibeaux, combined with the officer's determination that Ferguson's location was a place of interest for Thibeaux, provided a specific and articulable objective factual basis for reasonably suspecting that the fugitive Thibeaux was present and that an investigatory *Terry* stop was warranted. *See Smith*, 952 F.3d at 647-48; *see also United States v. Campbell*, 178 F.3d 345, 348 (5th Cir. 1999) (concluding that reasonable suspicion justified a *Terry* stop where the defendant matched the description of a bank robber and was seen approaching a car that matched the description of the getaway vehicle).

In light of the foregoing, Ferguson has failed to establish that his incriminating post-arrest statement was derived from an unconstitutional seizure of his person. *See Mendez*, 885 F.3d at 909. Accordingly, the district court did not err in denying Ferguson's motion to suppress. *See Smith*, 952 F.3d at 646. The judgment of the district court is AFFIRMED.