Reasonable Suspicion Arising After An Officer's Order to Stop

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Normally, a law enforcement officer will attempt to develop reasonable suspicion *before* instructing a person to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the suspect's compliance with the officer's instruction? For example, suppose that an officer sees a vehicle weaving within its lane of travel. Standing alone, this does not provide reasonable suspicion that the driver is impaired, and it will not support a stop. *State v. Fields*, 195 N.C. App. 740 (2009). Assume that the officer, not having read *Fields*, nonetheless activates his blue lights. The driver then changes lanes without signaling before pulling over. It turns out that the driver is impaired, and prior to his DWI trial, he moves to suppress, arguing that the stop was not supported by reasonable suspicion and citing *Fields.* Can the stop be justified based on the driver's failure to signal while changing lanes in violation of G.S. 20-154(a), even though the violation took place *after* the officer attempted to initiate the stop?

Probably so. In *California v. Hodari D.*, 499 U.S. 621 (1991), the United States Supreme Court held that an officer's show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a suspect's submission to it, may be used to justify the seizure. At least that's the conclusion that the Second Circuit reached in *United States v. Swindle*, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure). Other courts have reached similar results. *See*, *e.g.*, *United States v. Smith*, 217 F.3d 746 (9th Cir. 2000) (relying on *Hodari D.* to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"); *United States v. McCauley*, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of *attempted* seizure."); *United States v. Johnson*, 212 F.3d 1212 (D.C. Cir. 2000) (similar). *Cf. generally* 4 Wayne R. LaFave, *Search and Seizure* § 9.4(d) n. 170 (collecting cases).

If the analysis above is correct, some interesting questions arise. For example, does a motorist submit to an officer's show of authority as soon as he begins to slow down, only when he has come to a complete stop, or somewhere in between? In the right case, the answer could make all the difference, but I'll leave that topic for another day.