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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

NO. 30,813

5 **STEVEN DELEON,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8 **Robert S. Orlick, District Judge**

9 Gary K. King, Attorney General

10 Nicole Beder, Assistant Attorney General

11 Santa Fe, NM

12 for Appellant

13 Daniel R. Lindsey, P.C.

14 Daniel R. Lindsey

15 John L. Collins

16 Clovis, NM

17 for Appellee

18 **MEMORANDUM OPINION**

19 **HANISEE, Judge.**

1 The State appeals from the district court’s order granting Defendant’s motion
2 to suppress evidence related to driving while intoxicated (DWI) charges. The district
3 court had suppressed the evidence in question after determining that the arresting
4 officer stopped Defendant on a pretextual and constitutionally invalid basis under
5 *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143. The State argues that
6 (1) the district court incorrectly applied the law to the facts in concluding that the stop
7 was pretextual; (2) even if the officer stopped Defendant for a traffic infraction with
8 a hunch that Defendant had been driving while intoxicated, the hunch was a product
9 of Defendant’s driving and therefore was not pretextual under *Ochoa*; and (3) this
10 Court should overrule *Ochoa* and apply a standard of objective reasonableness to
11 uphold the validity of the stop at issue. We are unpersuaded by the State’s arguments
12 and therefore affirm.

13 **I. BACKGROUND**

14 In an area near Webb’s Watering Hole (the Bar), in Clovis, New Mexico, State
15 Police Officer Telles stopped Defendant’s vehicle after observing Defendant’s tires
16 cross approximately two inches into the center line when making a right turn on July
17 31, 2009. As a result of this stop, Defendant was arrested and charged with DWI.
18 Defendant subsequently moved to suppress the evidence associated with the stop,
19 arguing that the stop was pretextual under *Ochoa*, 2009-NMCA-002, ¶ 40. At the
20 suppression hearing, Defendant elicited testimony from Officer Telles which indicated

1 that he had made stops for minor traffic violations, like the one at issue here, in order
2 to investigate DWIs for which he lacked reasonable suspicion. Defendant also
3 introduced testimony from seven other drivers who testified that they too had been
4 pulled over within the past eighteen months for minor traffic violations after leaving
5 the Bar. In every instance of an alleged pretextual stop by a testifying witness, no
6 traffic citation was issued if no DWI was charged.

7 The district court found that:

8 1. The crux of the issue is whether Defendant's stop was pretextual,
9 therefore violative of Article 2, Section 10 of the New Mexico
10 Constitution;

11 2. An inordinate number of drivers have been pulled over after leaving
12 [the Bar], a local liquor establishment;

13 3. All drivers were stopped on the basis of a minor traffic violation;

14 4. All drivers were initially asked "have you been drinking";

15 5. Defendant established a rebuttable presumption that the stop was
16 pretextual;

17 6. The burden shifted to Officer Telles to establish that he would have
18 stopped . . . Defendant despite the alleged pretextual circumstances;

19 7. In every instance of an alleged pretextual stop by a testifying
20 witness[] in this proceeding, if there was no DWI charged, "NO
21 TRAFFIC TICKET WAS ISSUED[.]"

22 The court concluded that the stop "was not made on a constitutionally valid basis but
23 was pretextual to pursue a hunch that Defendant was driving under the influence[.]"

1 and dismissed the case. The State now appeals.

2 **II. DISCUSSION**

3 The State challenges the district court’s finding that the stop was pretextual and
4 *Ochoa*’s application to DWI cases. The State also suggests that we overrule *Ochoa*.
5 With regard to suppression orders, we review findings of fact to determine if they are
6 supported by substantial evidence and legal conclusions de novo. *State v. Leyba*,
7 1997-NMCA-023, ¶ 8, 123 N.M. 159, 935 P.2d 1171. “In reviewing the application
8 of law to facts, we view the facts in a manner most favorable to the prevailing party.”
9 *State v. Baca*, 2004-NMCA-049, ¶ 11, 135 N.M. 490, 90 P.3d 509.

10 A pretextual stop is defined as “a detention supportable by reasonable suspicion
11 or probable cause to believe that a traffic offense has occurred, but is executed as a
12 pretense to pursue a ‘hunch,’ a different more serious investigative agenda for which
13 there is no reasonable suspicion or probable cause.” *State v. Gonzales*, 2011-NMSC-
14 012, ¶ 12, 150 N.M. 74, 257 P.3d 894 (internal quotation marks and citation omitted).
15 Such stops are impermissible under the New Mexico Constitution. *Id.* ¶ 11. A three-
16 step approach is followed when determining whether a pretextual stop has occurred:

17 First, the State has the burden to establish reasonable suspicion to stop
18 the motorist. If the State fails in its burden, the stop is unconstitutional.
19 Second, if the State satisfies its burden, the defendant may still establish
20 that the seizure was unreasonable by proving that the totality of the
21 circumstances indicates the officer had an unrelated motive to stop the
22 motorist that was not supported by reasonable suspicion. If the
23 defendant does not satisfy the burden, the stop is constitutional. Third,

1 if the defendant satisfies the burden, there is a presumption of a
2 pretextual stop, and the State must prove that the totality of the
3 circumstances supports the conclusion that the officer who made the stop
4 would have done so even without the unrelated motive.

5 *Id.*, ¶ 12 (citing *Ochoa*, 2009-NMCA-002, ¶ 40). We note that facts relevant to the
6 totality of the circumstances include

7 whether the defendant was arrested for and charged with a crime
8 unrelated to the stop; . . . whether the officer had information, which did
9 not rise to the level of reasonable suspicion or probable cause, relating
10 to another offense; the manner of the stop, including how long the officer
11 trailed the defendant before performing the stop, how long after the
12 alleged suspicion arose or violation was committed [after] the stop was
13 made . . .; the conduct, demeanor, and statements of the officer during
14 the stop; the relevant characteristics of the defendant; whether the
15 objective reason articulated for the stop was necessary for the protection
16 of traffic safety; and the officer’s testimony as to the reason for the stop.

17 *Ochoa*, 2009-NMCA-002, ¶ 41.

18 Here, the inquiry is whether substantial evidence supports the district court’s
19 determination that the stop was pretextual under the totality of the circumstances.
20 Officer Telles testified that his sole basis to stop Defendant was his observation of
21 Defendant committing a wide turn violation. But in response to questions posed by
22 defense counsel, Officer Telles stated: “The reason why I make little stops like wide
23 turns and stuff like that is to get the stop, and then I go from there for DWI.” In
24 addition, Defendant produced evidence indicating that seven other drivers had been
25 pulled over for minor traffic violations, some drivers multiple times, after leaving the
26 Bar over the last eighteen months. Notably, the first question asked when police

1 officers stopped these patrons and employees was whether the driver had been
2 drinking. And, no ticket was ever issued for the infraction leading to the stop if the
3 driver was found to be sober.

4 Diandra Sandoval testified that she has been a bartender at the Bar for the past
5 two years. She stated that she was once stopped by state police officer when leaving
6 work at around 1:00 A.M. for making too wide of a turn and crossing into the white
7 line. The first thing the police officer asked her when he stopped her was whether she
8 had been drinking, and the officer subsequently required her to perform field sobriety
9 tests. Upon being found sober, no ticket was issued by the officer for the wide turn.

10 Neal McCorkel testified that Officer Telles stopped him after leaving the Bar
11 in May 2009 for making too wide of a left turn. Officer Telles pulled out from a motel
12 parking lot or gas station across the street from the Bar and followed McCorkel from
13 the Bar for three blocks before making the stop. Similarly, Jason Jones testified that
14 in March 2009, at around 2:30 A.M., he noticed Officer Telles following him just after
15 he left the Bar until Officer Telles stopped him for speeding. The first question Officer
16 Telles asked Jones was whether he had been drinking.

17 Julian Castillo testified that in June 2009, he went to the Bar around 1:00 A.M.
18 to pick up a friend. After Castillo pulled out of the Bar's parking lot, Officer Telles,
19 who was parked nearby, began following him. Castillo stated that Officer Telles
20 pulled him over for making an illegally wide left turn and because his license plate

1 light was out. After stopping Castillo, Officer Telles first asked Castillo whether he
2 had been drinking. Although he had not been drinking, Castillo was subsequently
3 arrested for DWI, and the charges were later dropped.

4 James Calder worked at the Bar from July 2009 until February 2010 in the
5 evenings. He testified that he saw state police officers parked numerous times in the
6 parking lot or across the street from the Bar. He saw police vehicles driving around
7 the Bar at least once or twice per night. And, he was personally pulled over after
8 leaving work on two different occasions for minor traffic violations, which included
9 changing lanes without signaling. The officers who pulled him over always asked him
10 first whether he had been drinking. Calder was never issued a citation for the minor
11 traffic violations.

12 Alisha Scholer has been bartending at the Bar for the past two-and-a-half years.
13 She works Tuesday through Saturday from 7:00 P.M. until 1:15 A.M. and has
14 observed state police parking near the Bar. She testified that during her shift, she
15 observes people stopped by state police near the Bar on a daily basis. Six to eight
16 months before she gave her testimony, she too was stopped by a state police officer
17 at approximately 2:00 A.M. while driving some customers from the Bar back to a
18 hotel. Upon departing from the hotel, which was less than a mile from the Bar, she
19 was stopped by a police officer for making too wide of a turn. The first thing the
20 officer asked her when he approached her vehicle was whether she had been drinking.

1 He subsequently required her to do field sobriety tests. She received no citation as a
2 result of the stop.

3 Finally, Larry Williams has worked at the Bar for the last five years. Williams
4 testified that within the last year, he had been stopped by state police over nine times
5 when leaving work. The reasons for these stops included not staying in the right lane
6 long enough before changing lanes, making too wide of a turn, and having head lights
7 that were not bright enough. These stops typically occurred between 11:30 P.M. and
8 midnight, while Williams was driving customers home. All nine stops were made by
9 state police officers, and Williams never received a traffic citation as a result of any
10 of these stops. Without fail, the first thing the police officers always asked him was
11 whether he had been drinking. The longest an officer followed him before making
12 one of these stops was four to five miles. Williams testified that he has seen state
13 police officers parking near the Bar frequently.

14 Defendant argued that this pattern of stopping drivers near the Bar for minor
15 traffic violations and initially inquiring whether they had been drinking was again
16 demonstrated by the stop in the present case and is pretextual. The State countered that
17 Defendant's evidence of pretext was insufficient and not credible. The State relied
18 solely on Officer Telles's testimony to rebut Defendant's assertion that the stop was
19 pretextual. Officer Telles testified that the Bar was merely along his patrol route,
20 which takes him by the Bar three times per hour, four nights per week. Officer Telles

1 denied ever parking near the Bar. He stated that he first saw Defendant at a stop light
2 about a mile from the Bar, and maintained that the sole reason for the stop was that
3 Defendant made an illegally wide turn.

4 Based on the totality of the circumstances before the district court, we conclude
5 that there is substantial evidence to support the district court's finding that the stop
6 was pretextual and that the State has failed to prove that Officer Telles would have
7 made the stop even without Officer Telles's unrelated motive to investigate DWI.
8 First, Officer Telles admitted that his stops involving minor traffic offenses, like wide
9 turns, were pretextual, stating that "[t]he reason why I make little stops like wide
10 turns and stuff like that is to get the stop, and then I go from there for DWI." This
11 testimony establishes that Officer Telles subjectively possessed a motive unrelated to
12 the wide turn to stop Defendant. Since Officer Telles provided no separately valid
13 reason for stopping Defendant, the stop for any other purpose, including DWI, could
14 not have been supported by reasonable suspicion. Second, Defendant's witnesses
15 established a clear pattern of state police officers patrolling the area around the Bar,
16 stopping drivers for minor traffic infractions in the late evening or early morning, first
17 asking the driver whether he or she has been drinking, then only issuing a citation for
18 the minor traffic violation when a DWI arrest was made. Based on this pattern and
19 Officer Telles's admission, there is substantial evidence that Officer Telles used the
20 wide turn violation to pursue his hunch that Defendant was driving while intoxicated,

1 for which there was no reasonable suspicion or probable cause.

2 We recognize that Officer Telles denied waiting near the Bar and stopping
3 Defendant for any other reason than to investigate a wide turn. Nonetheless, the
4 district court was entitled to consider the entirety of Officer Telles’s testimony,
5 alongside other evidence before the district court, in determining that Defendant’s stop
6 was in fact pretextual. *See State v. Roybal*, 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct.
7 App. 1992) (stating that “[i]t was for the [district] court as fact-finder to resolve any
8 conflict in the testimony of the witnesses and to determine where the weight and
9 credibility lay”). We also note that the State failed to produce any testimony that the
10 wide turn, which only resulted in Defendant’s tire crossing two inches into the center
11 line, was evidence of the driver’s impairment. Therefore, based upon the substantial
12 evidence supporting the district court’s determination that this was a pretextual stop,
13 we affirm its ruling in this regard.

14 To the extent that the State argues that DWIs are related to driving and thus
15 *Ochoa* does not apply, we cannot agree. In *Schuster v. State Department of Taxation*
16 *& Revenue, Motor Vehicle Division*, 2012-NMSC-025, ¶¶ 32-37, 283 P.3d 288, 291,
17 our Supreme Court applied *Ochoa* to DWIs. Based upon the Supreme Court’s
18 application of *Ochoa* in this circumstance, we are bound to conclude that *Ochoa*
19 applies in a DWI context. *See State v. Wilson*, 116 N.M. 793, 795, 867 P.2d 1175,
20 1177 (1994) (holding that the Court of Appeals is bound by Supreme Court

1 precedent). Likewise, in *Gonzales*, 2011-NMSC-012, ¶¶ 11-12, our Supreme Court
2 affirmed New Mexico’s adoption of the totality of the circumstances test set forth in
3 *Ochoa*. For these reasons, we cannot, as the State requests, overrule *Ochoa* and
4 “apply a standard of objective reasonableness” to evaluate the stop.

5 **III. CONCLUSION**

6 For the reasons stated above, we affirm the district court.

7 **IT IS SO ORDERED.**

8
9

J. MILES HANISEE, Judge

10 **WE CONCUR:**

11

12 **RODERICK T. KENNEDY, Chief Judge**

13

14 **JAMES J. WECHSLER, Judge**