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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 **v.**

No. 32,837

5 **GERALD CHAVEZ,**

6 Defendant-Appellant.

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

8 **Christina P. Argyres, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Acting Chief Public Defender

13 Santa Fe, NM

14 Josephine H. Ford, Assistant Appellate Defender

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **BUSTAMANTE, Judge.**

1 {1} Gerald Chavez (Defendant) appeals from the district court’s judgment in an on-
2 record metropolitan court appeal. [RP 79] The judgment affirms the metropolitan
3 court’s judgment convicting Defendant of DWI (1st offense), pursuant to a conditional
4 plea. [Id.] In the plea agreement [RP 36], Defendant reserved the right to appeal the
5 metropolitan court’s decision to deny his motion to suppress. [RP 34] This Court’s
6 calendar notice proposed summary affirmance. [Ct. App. File, CN1] Defendant has
7 filed a memorandum in opposition that we have duly considered. [Ct. App. File,
8 MIO] Unpersuaded, however, we affirm.

9 **Issue 1 - Reasonable Suspicion to Support the Stop.**

10 {2} In his memorandum, Defendant continues to argue that the officer was not close
11 enough to Defendant’s vehicle to notice that there was no other traffic near Defendant
12 that could have caused Defendant to sound his horn. [MIO 7] Defendant points out
13 that the officer did not testify that he never lost sight of Defendant’s vehicle and that
14 the officer only testified that he did not see any other traffic as he approached
15 Defendant. [MIO 7-8] Further, Defendant points out that, in the dark from two blocks
16 away any dark-colored vehicle would have been difficult to see, “especially a car on
17 a side street off Montgomery.” [MIO 8] As such, Defendant argues that the State
18 failed to show that an objectively reasonable officer would have believed he had

1 reasonable suspicion to stop Defendant for a horn violation. [MIO 8] We are not
2 persuaded.

3 {3} As we discussed in the calendar notice, “[a]ppellate review of a motion to
4 suppress presents a mixed question of law and fact.” *State v. Ketelson*,
5 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957. First, a reviewing court looks
6 “for substantial evidence to support the trial court’s factual finding, with deference to
7 the district court’s review of the testimony and other evidence presented.” *State v.*
8 *Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861. “We then review the
9 application of the law to those facts, making a de novo determination of the
10 constitutional reasonableness of a search or seizure.” *State v. Sewell*,
11 2009-NMSC-033, ¶ 12, 146 N.M. 428, 211 P.3d 885.

12 {4} “An automobile stop and the attendant detention of its occupants is a ‘seizure.’”
13 *State v. Olson*, 2012-NMSC-035, ¶ 11, 285 P.3d 1066 (citing *State v. Duran*,
14 2005-NMSC-034, ¶¶ 22-23, 138 N.M. 414, 120 P.3d 836, *overruled on other grounds*
15 *by Leyva*, 2011-NMSC-009, ¶ 17). “In *Duran*, this Court recognized the two-part test
16 from *Terry v. Ohio*, 392 U.S. 1, 20 (1968), [which is] whether the officer’s action was
17 justified at its inception, and whether it was reasonably related in scope to the
18 circumstances which justified the interference in the first place.” *Olson*, 2012-NMSC-
19 035, ¶ 11 (internal quotation marks and citation omitted); *see also Leyva*,

1 2011-NMSC-009, ¶¶ 3, 28 (upholding *Duran* as the appropriate inquiry for evaluating
2 permissible officer questioning during traffic stops under Article II, Section 10 of the
3 New Mexico Constitution).

4 {5} The docketing statement and the memorandum agree that the officer testified
5 at trial as follows. On November 9, 2008, at about 1:50 a.m., the officer was traveling
6 westbound on Montgomery approaching Louisiana, when he heard a car horn sound
7 about four or five times. [DS 2, MIO 1] There was a small amount of traffic traveling
8 eastbound and the officer first assumed that the sound came from one of them. [Id.]
9 The officer was about a quarter of a mile behind Defendant's car and continued
10 driving behind Defendant's car, closing the distance between them to about two
11 blocks. [Id.] The officer testified that he observed Defendant's car weaving within
12 the lane. [DS2, MIO 2] The officer heard the horn sound again two or three times and
13 he could hear that it was coming from Defendant's vehicle. [Id.] The officer further
14 testified that at that point, aside from the officer's and Defendant's vehicles, there was
15 no other traffic on Montgomery or the side streets. [DS 3, MIO 2] The officer stated
16 that when he heard the horn, he looked down the side streets he passed to see if there
17 were any other vehicles and when he heard the horn the second time, there was no
18 other traffic around and therefore no reason for a driver to sound his horn. [Id.] The

1 officer testified that he stopped Defendant for unnecessary use of the horn and for
2 weaving within his lane. [Id.]

3 {6} Defendant testified that he used his horn when a car almost came to a complete
4 stop in his lane, that the other car was some distance ahead of him, that he did not
5 think he swerved but that he may have swerved to avoid the other car. [DS 3-4, MIO
6 3] Defendant also testified that the other car's stopping in his lane was the only
7 reason for honking his horn and that he does not honk his horn just for the fun of it.
8 [DS 4, MIO 3] The metropolitan court denied the motion to suppress, ruling that the
9 officer had reasonable suspicion to stop Defendant for violation of NMSA 1978,
10 Section 66-3-843 (1978) (regulating the use of horns and warning devices). [RP 34]
11 We agree.

12 {7} Section 66-3-843 provides, in pertinent part, that “[t]he driver of a motor
13 vehicle shall when reasonably necessary to ensure safe operation give audible warning
14 with his horn but shall not otherwise use such horn when upon a highway.” {8}

15 The officer's testimony indicated that Defendant kept honking his horn when
16 there were no other vehicles around. [DS 5, MIO 4] To the extent that Defendant
17 offered conflicting testimony that he honked at a vehicle that stopped in his lane, the
18 metropolitan judge as fact finder at the suppression hearing, is entitled to find the
19 officer's testimony credible and to reject Defendant's version of events. *See State v.*

1 *Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for
2 the fact finder to resolve any conflict in the testimony of the witnesses and to
3 determine where the weight and credibility lie); *see also State v. Rojo*, 1999-NMSC-
4 001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (stating that contrary evidence supporting
5 acquittal does not provide a basis for reversal because the fact finder is free to reject
6 the defendant’s version of the facts). Similarly, to the extent Defendant argues in the
7 memorandum that the darkness of the night or the officer’s vehicle’s distance from
8 Defendant’s vehicle would have made it difficult for the officer to see what Defendant
9 was honking at or whether there were other vehicles down side streets [MIO 7-8],
10 these are matters for the fact finder involving the credibility of the officer’s testimony
11 and the weight to be given to it. *See State v. Garvin*, 2005-NMCA-107, ¶ 5, 138 N.M.
12 164, 117 P.3d 970 (observing that as the appellate court, we do not substitute our
13 judgment for that of the fact finder concerning the credibility of witnesses or the
14 weight to be given their testimony).

15 {9} We affirm the district court’s decision to affirm the metropolitan court’s denial
16 of the motion to suppress. We hold that the stop was based on reasonable suspicion
17 that Defendant was violating Section 66-3-843. *See State v. Vandenburg*,
18 2003-NMSC-030, ¶ 21, 134 N.M. 566, 81 P.3d 19 (recognizing that the arresting

1 officer “reasonably suspected that [the defendant] had violated a traffic law, and
2 therefore, [the officer] was entitled to stop [the defendant’s] car”).

3 **Issue 2 - Constitutional Vagueness Challenge.**

4 {10} In the memorandum, Defendant contends that the statute regulating horn use
5 while driving permits “police officers, prosecutors, judges, or juries to engage in
6 arbitrary and discriminatory enforcement of the statute” because it has no standards
7 or guidelines, which encourages “subjective and ad hoc application.” [MIO 9]
8 Defendant contends that since it was “up to the officer to decide whether use of the
9 horn was reasonable,” this led to an “absurd result,” because “it leads to traffic stops
10 and prosecutions based on questionable facts, when drivers have no means of
11 ascertaining where to draw the line between reasonable and unreasonable use of the
12 horn.” [MIO 9-10] Defendant further argues that, therefore, the statute
13 unconstitutionally “delegates to the officer” “the policy decision” or “complete
14 discretion” whether to stop a driver who uses his horn “when the officer does not see
15 any other traffic near the driver.” [MIO 10] We are not persuaded.

16 {11} As we discussed in the calendar notice, this Court reviews a constitutional
17 vagueness challenge de novo in light of the facts of the case and the conduct that is
18 being prohibited by the statute. *See State v. Smile*, 2009-NMCA-064, ¶ 17, 146 N.M.

1 525, 212 P.3d 413. Statutes are presumed constitutional and Defendant bears the
2 burden of establishing unconstitutionality. *See id.*

3 {12} We remain persuaded that, as the district court recognized in its memorandum
4 opinion, Defendant has failed to demonstrate that the statute did not give him a fair
5 opportunity to determine whether his conduct was prohibited. [RP 91] Defendant
6 testified that he did not think he violated the statute because he only honked his horn
7 to warn another driver, and he does not honk his horn for the fun of it. [RP 91; DS 4]
8 As such, although the metropolitan court did not find this testimony credible,
9 Defendant's own testimony indicates that the statute gave him a fair opportunity to
10 determine what conduct was prohibited.

11 {13} Moreover, we cannot say that the statute provides no guidelines for when a
12 violation has occurred thereby allowing for arbitrary or ad hoc vehicle stops and
13 prosecutions, as Defendant argues in the memorandum. [MIO 8-10] The officer
14 testified that he pulled Defendant over because Defendant was honking his horn
15 repeatedly at 1:50 a.m. on a city street when no other traffic was around, and, in
16 contrast, Defendant testified that a vehicle stopped in front of him, making it
17 reasonably necessary to sound his horn. As stated in our discussion of Issue 1, we do
18 not substitute our judgment for that of the fact finder concerning the credibility of
19 witnesses or the weight to be given their testimony. *Garvin*, 2005-NMCA-107, ¶ 5.

1 The objective circumstances of Defendant’s conduct observed by the officer, whom
2 the fact finder found to be credible, are proscribed by the guidelines of the statute.

3 {14} The fact that a statute may be written in general terms and that it then must be
4 applied on a case-by-case basis does not establish that it is unconstitutionally vague.
5 *See, e.g., State v. Fleming*, 2006-NMCA-149, ¶ 5, 140 N.M. 797, 149 P.3d 113
6 (stating that room in a statute for the exercise of charging discretion does not establish
7 that a statute is void for vagueness); *see also State v. Larson*, 1980-NMSC-106, ¶ 5,
8 94 N.M. 795, 617 P.2d 1310 (stating that a statute is not unconstitutionally vague just
9 because “marginal cases could be put where doubts might arise”).

10 {15} Finally, the statute clearly applies in this case to proscribe Defendant’s conduct.
11 *See State v. Laguna*, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896 (reasoning
12 that if a statute clearly applies to a person’s conduct, then it is not unconstitutionally
13 vague). As discussed above, according to the officer’s version of the facts, which the
14 metropolitan court found to be credible, Defendant’s conduct of sounding his horn
15 when there was no other traffic and no need to give audible warning to ensure safe
16 operation, constituted a clear violation of the statute.

17 {16} We affirm Defendant’s conviction for DWI (1st offense).

18 {17} **IT IS SO ORDERED.**

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2

MICHAEL D. BUSTAMANTE, Judge

3 **WE CONCUR:**

4

5 **MICHAEL E. VIGIL, Judge**

6

7 **TIMOTHY L. GARCIA, Judge**