

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

2 Opinion Number: _____

3 Filing Date: January 6, 2015

4 **NO. 32,516**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JENNIFER MARTINEZ,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

11 **Karen L. Townsend, District Judge**

12 Gary K. King, Attorney General

13 Santa Fe, NM

14 Ralph E. Trujillo, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 Jorge A. Alvarado, Chief Public Defender

18 David Henderson, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} This case presents a new wrinkle on reasonable suspicion. The arresting
4 officer testified that Defendant ran a stop sign and came to a stop in the middle of the
5 intersection, blocking his lane of travel. However, the dashboard camera in the
6 officer's police car demonstrated that this was not the case. The district court found
7 that the officer exaggerated, at least, and gave no credence to the officer's testimony.
8 Nevertheless, relying on the dashboard camera video, the district court found that the
9 officer had reasonable suspicion to stop Defendant and denied Defendant's motion
10 to suppress. On review, we find the video evidence to be ambiguous. Because the
11 district court found that the officer was not credible, and we do not agree with the
12 district court that the video evidence alone supports a finding of reasonable suspicion,
13 we reverse.

14 **I. BACKGROUND**

15 {2} Defendant was charged in the magistrate court with driving under the influence
16 of intoxicating liquor (DWI), having an open container in the vehicle, and failure to
17 stop at a stop sign. Defendant's motion to suppress on the basis that the officer had
18 no reasonable suspicion to stop her vehicle was denied, and Defendant entered into
19 a plea and disposition agreement, reserving her right to appeal the denial of her

1 motion to suppress. In Defendant’s de novo appeal to the district court, an
2 evidentiary hearing was held on Defendant’s motion to suppress. Concluding that
3 reasonable suspicion supported the stop of Defendant’s vehicle, the district court
4 denied the motion and remanded the case to the magistrate court. Additional
5 proceedings took place in the magistrate court and district court, which we discuss
6 in more detail below, and Defendant appeals.

7 **II. DISCUSSION**

8 **A. Timely Appeal**

9 {3} We first address the State’s assertion that the appeal is not properly before us
10 because Defendant is appealing from the order denying her motion to suppress, and
11 the notice of appeal from that order was not filed on time. “The timely filing of a
12 notice of appeal is a mandatory precondition to this Court’s exercise of jurisdiction.”
13 *State v. Vigil*, 2014-NMCA-096, ¶ 7, 336 P.3d 380, *cert. granted*, 2014-NMCERT-
14 009, 337 P.3d 095. The State’s argument arises in the following context.

15 {4} The district court order denying Defendant’s motion to suppress and remanding
16 the case to the magistrate court was filed on July 22, 2010. Over two months later on
17 October 12, 2010, Defendant attempted to fax file a notice of appeal in the magistrate
18 court, appealing the district court order to this Court, but the notice of appeal does not
19 seem to have been filed. In any event, the attempted filing was not timely, and the

1 notice should have been filed with the district court, not the magistrate court. *See*
2 Rule 12-201(A)(2) NMRA (directing that a notice of appeal from the district court
3 is to be filed with the clerk of the district court within thirty days from the date the
4 order or judgment is filed). Defendant was then sentenced in the magistrate court,
5 and Defendant again appealed to the district court, creating a new district court cause
6 number. Defendant then filed a motion to incorporate the original district court
7 appeal with the new case on grounds that the failure to perfect the original appeal was
8 the fault of defense counsel. The district court denied the motion and dismissed the
9 case. Defendant appeals.

10 {s} In *State v. Duran*, 1986-NMCA-125, ¶ 1, 105 N.M. 231, 731 P.2d 374, we held
11 that there is a conclusive presumption of ineffective assistance of counsel where a
12 notice of appeal is not filed within the time limit required. In such cases, we will
13 entertain a criminal appeal on the merits. *State v. Lope*, 2014-NMCA-____, ¶ 8,
14 ____ P.3d ____ (No. 32,511, July 24, 2014). We have recently applied the presumption
15 in several contexts. *See State v. Dorais*, 2014-NMCA-____, ¶¶ 4-5, 7, ____ P.3d ____
16 (No. 32,235, May 21, 2014) (concluding that the *Duran* presumption applies where
17 the notice of appeal was not filed for four years following a de novo trial in the
18 district court in an appeal from the magistrate court); *Vigil*, 2014-NMCA-096, ¶ 16
19 (applying the *Duran* presumption when “an untimely notice of appeal is filed

1 following the district court’s on-record review of a metropolitan court decision”);
2 *State v. Eger*, 2007-NMCA-039, ¶ 5, 141 N.M. 379, 155 P.3d 784 (holding that the
3 *Duran* presumption of ineffectiveness of counsel applies to a defendant’s right to
4 appeal a conditional plea agreement to the district court). *Cf. State v. Lope*, 2014-
5 NMCA-____, ¶ 9 (applying the *Duran* presumption where the notice of appeal was
6 timely filed, but the inaction of counsel resulted in the appeal being dismissed);
7 *Olguin v. State*, 1977-NMSC-034, ¶¶ 1, 7, 90 N.M. 303, 563 P.2d 97 (concluding that
8 dismissal of the appeal was not warranted where counsel filed a timely notice of
9 appeal but did not perfect the appeal because the docketing statement was not filed
10 on time).

11 {6} Here, defense counsel unsuccessfully attempted to fax file a notice of appeal
12 from the district court order denying Defendant’s motion to suppress in the wrong
13 court, and it was untimely. Not applying the *Duran* presumption in this case will
14 result in denying Defendant her constitutional right to appeal because of counsel’s
15 failure to comply with the requirements for perfecting the appeal. Because there is
16 no material distinction between the case now before us and our existing precedent in
17 this regard, we conclude the presumption applies and proceed to decide the merits.

1 **B. Motion to Suppress**

2 {7} The sole issue on appeal is whether Sergeant Rascon had a reasonable
3 suspicion that Defendant failed to stop at a stop sign. In the context of a non-
4 pretextual traffic stop, “a police officer must have reasonable suspicion of criminal
5 activity or probable cause that the traffic code has been violated.” *State v. Hicks*,
6 2013-NMCA-056, ¶ 14, 300 P.3d 1183 (internal quotation marks and citation
7 omitted), *cert. denied*, 2014-NMCERT-004, 301 P.3d 858. Thus, “the State has the
8 burden to establish reasonable suspicion to stop the motorist. If the State fails in its
9 burden, the stop is unconstitutional.” *State v. Gonzales*, 2011-NMSC-012, ¶ 12, 150
10 N.M. 74, 257 P.3d 894 (citing *State v. Ochoa*, 2009-NMCA-002, ¶ 40, 146 N.M. 32,
11 206 P.3d 143). “As usual, the State has the burden of proof to justify the stop under
12 an exception to the warrant requirement.” *Ochoa*, 2009-NMCA-002, ¶ 40.

13 {8} A reasonable suspicion is “a particularized suspicion, based on all the
14 circumstances that a particular individual, the one detained, is breaking, or has
15 broken, the law.” *State v. Neal*, 2007-NMSC-043, ¶ 21, 142 N.M. 176, 164 P.3d 57
16 (emphasis, internal quotation marks, and citation omitted). On appeal, we determine
17 whether the facts found by the district court are supported by substantial evidence,
18 and we review the application of the law to the facts under a de novo standard of
19 review. *State v. Alderete*, 2011-NMCA-055, ¶ 9, 149 N.M. 799, 255 P.3d 377.

1 Therefore, “[q]uestions of reasonable suspicion are reviewed de novo by looking at
2 the totality of the circumstances to determine whether the detention was justified.”
3 *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206 P.3d 579 (internal quotation
4 marks and citation omitted); see *Alderete*, 2011-NMCA-055, ¶¶ 13-14 (stating that
5 with respect to a district court’s determination of reasonable suspicion, our review is
6 de novo); *State v. Candelaria*, 2011-NMCA-001, ¶ 8, 149 N.M. 125, 245 P.3d 69
7 (“[W]e consider de novo whether the disputed police activity was reasonable given
8 the totality of the circumstances.”). “We will find reasonable suspicion if the officer
9 is aware of specific articulable facts, together with rational inferences from those
10 facts, that, when judged objectively, would lead a reasonable person to believe
11 criminal activity occurred or was occurring.” *Hubble*, 2009-NMSC-014, ¶ 8 (internal
12 quotation marks and citation omitted). In making this determination, “it is the
13 evidence known to the officer that counts[.]” *Id.* Finally, we must determine that
14 “the officer’s action was justified at its inception.” *Terry v. Ohio*, 392 U.S. 1, 19-20
15 (1968).

16 {9} At the evidentiary hearing in the district court Sergeant Rascon testified that
17 at approximately 10:00 p.m., he was on patrol traveling south on a two-lane road
18 when he observed Defendant approaching an intersection with a four-way stop sign
19 at a high rate of speed. “And at the four-way stop sign the vehicle just went past the

1 stop sign completely into the lane of traffic, southbound lane of traffic. She stepped
2 on her brakes completely and she made a complete stop, but it was in the middle, in
3 the lane of traffic.” Sergeant Rascon said that Defendant then made a wide left turn
4 and proceeded north. On cross examination, Sergeant Rascon clarified that
5 Defendant was traveling east and traveled past the stop sign so far, that when she
6 stopped, she was in the middle of the southbound traffic lane, blocking his lane of
7 travel. Sergeant Rascon did not cite Defendant for speeding (he did not know how
8 fast Defendant was driving), or for making a wide turn. The only traffic infraction
9 he cited Defendant with was failure to stop at a stop sign.

10 {10} The stop was recorded by Sergeant Rascon’s dashboard camera, and the video
11 was admitted into evidence. After viewing the video, the district court said:

12 Alright, well you know after hearing Sergeant Rascon’s testimony I was
13 certainly confused as to why the Defendant would file the motion to
14 suppress because he made it sound very clear why, why he stopped and
15 that there was reasonable suspicion, but I think it just goes to show you
16 really need to review the video in every case. And in this case after
17 reviewing the video, I truly find the truth somewhere in between both
18 positions. I certainly didn’t see Sergeant Rascon’s testimony that there
19 was, she stopped in the middle of the intersection, I don’t think that was
20 the case. However I do think she, she seemed to be going quickly, she
21 seemed to have slammed on her brakes, and she seems to have slammed
22 on her brakes further into the intersection than I think is allowable,
23 creating the reasonable suspicion for Sergeant Rascon to . . . stop
24 [Defendant]. So therefore I will deny Defendant’s motion to suppress
25 although I will grant that it was certainly a closer call than I thought it

1 was going to be at first. But I still think Sergeant Rascon did have
2 reasonable suspicion to stop her.

3 {11} To assess whether the evidence supports the district court’s conclusion that the
4 stop was supported by a reasonable suspicion, we begin with the applicable statute.
5 In pertinent part, NMSA 1978, Section 66-7-345(C) (2003) directs that “every driver
6 of a vehicle approaching a stop intersection indicated by a stop sign shall stop before
7 entering the crosswalk on the near side of the intersection or, in the event there is no
8 crosswalk, shall stop at a clearly marked stop line, but if none, then at the point
9 nearest the intersecting roadway before entering the intersection.” In this case, there
10 is no crosswalk or stop line; thus the question is whether the evidence supports a
11 conclusion that Sergeant Rascon had a reasonable suspicion that Defendant’s vehicle
12 failed to stop “at the point nearest the intersecting roadway before entering the
13 intersection.” *Id.*

14 {12} The district court made an express finding after viewing the video that
15 Defendant did not stop in the middle of the intersection, which was directly contrary
16 to Sergeant Rascon’s testimony. Also, the district court did not give any indication
17 that it inferred reasonable suspicion from the officer’s testimony. The district court
18 could, perhaps, have stripped away the officer’s exaggeration while giving credence
19 to the officer’s perception that Defendant came to rest in the intersection. But it did

1 not. Instead, the district court found that the officer was not credible. Again, a
2 finding of reasonable suspicion must be based on specific articulable facts that are
3 based on the officer's observations, and it is the evidence that is known to the officer
4 at the time of the stop that counts. Thus, the district court was left with no facts other
5 than the video on which to conclude that the stop was supported by a reasonable
6 suspicion.

7 {13} We also conclude that the video fails to support a finding of a reasonable
8 suspicion for the stop. The video shows the vehicle as Sergeant Rascon approaches
9 an intersection with a four-way stop sign. To the right, Defendant's car approached
10 the same intersection with its left turn signal on, signaling that Defendant's turn
11 would take her across Sergeant Rascon's lane of traffic, turning onto the same road
12 as Sergeant Rascon, headed the opposite direction. Defendant's vehicle came to a
13 complete stop. Then Sergeant Rascon's car stopped before he engaged his emergency
14 lights, executed a U-turn, and got behind Defendant to initiate the traffic stop. The
15 video shows there is no crosswalk or line painted on the road to indicate where
16 Defendant's car must be behind in order to be in compliance with Section 66-7-
17 345(C).

18 {14} What the video does not show is whether Defendant's vehicle stopped "at the
19 point nearest the intersecting roadway before entering the intersection" as required

1 by Section 66-7-345(C). Because of the angle on which the video is taken, it is
2 impossible to determine whether Defendant's vehicle is just barely in the intersection
3 (a violation) or just barely behind the intersection (no violation) when it came to a
4 stop. Because the district court did not give any credence to Sergeant Rascon's
5 testimony that Defendant stopped in the middle of the intersection, we must decide
6 whether an ambiguous video by itself can provide a police officer with a reasonable
7 suspicion. We conclude that it cannot. The burden to establish reasonable suspicion
8 falls on the State. *Gonzales*, 2011-NMSC-012, ¶ 12. Without more, an ambiguous
9 video does not meet that burden. *See City of E. Peoria v. Palmer*, 980 N.E.2d 774,
10 782-83 (Ill. App. Ct. 2012) (agreeing with the circuit court that the officer lacked
11 reasonable, articulable suspicion because the circuit court found the officer to be "not
12 credible" and the dashboard camera video did not provide "conclusive proof" of a
13 violation).

14 {15} We acknowledge that the district court also looked at the video, and that it
15 came to a different conclusion regarding reasonable suspicion. However, its findings
16 are expressed in speculative terms: "[Defendant] seemed to have slammed on her
17 brakes, and she seems to have slammed on her brakes further into the intersection
18 than I think is allowable[.]" The constitutionality of a stop premised upon reasonable
19 suspicion cannot be based upon speculation or conjecture. *See State v. Houghton*,

1 384 S.W.3d 441, 448-50 (Tex. Ct. App. 2012) (concluding that reasonable suspicion
2 could not be based solely on a video which did not “indisputably” show a traffic
3 violation). Moreover, reviewing a video by itself is like reviewing any other
4 documentary evidence, and we are in as good a position as the district court to view
5 the video and interpret what it shows. See *Kirkpatrick v. Introspect Healthcare*
6 *Corp.*, 1992-NMSC-070, ¶ 14, 114 N.M. 706, 845 P.2d 800 (“When the resolution
7 of the issue depends upon the interpretation of documentary evidence, this Court is
8 in as good a position as the trial court to interpret the evidence.”); *City of Raton v.*
9 *Vermejo Conservancy Dist.*, 1984-NMSC-037, ¶ 27, 101 N.M. 95, 678 P.2d 1170
10 (“[W]hen the issue to be determined rests upon the interpretation of documentary
11 evidence, this Court is in as good a position as the trial court to determine the facts
12 and draw its own conclusions[.]”).

13 {16} In *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000), a police officer
14 testified that the defendant consented to a search of his person, and on this basis, the
15 defendant’s motion to suppress was denied, which the intermediate court affirmed.
16 *Id.* at 326; 331. However, the Court of Criminal Appeals of Texas reversed both
17 lower courts because a video of the incident presented “indisputable visual evidence
18 contradicting essential portions” of the officer’s testimony, and the nature of the
19 evidence presented on the video did not turn on an evaluation of credibility and

1 demeanor. *Id.* at 332. We find such reasoning persuasive in this case. *See also State*
2 *v. Collins*, 45,979, p.3 (La. App. 2 Cir. 12/22/10) 87 So. 3d 857, 859 (concluding that
3 there was no unlawful driving on the basis of a video, notwithstanding the testimony
4 of an officer that there was).

5 {17} For the foregoing reasons, in our de novo review, we conclude that the
6 evidence fails to support a finding that a reasonable suspicion justified the stop of
7 Defendant's car for failing to stop at a stop sign.

8 **III. CONCLUSION**

9 {18} The order of the district court denying Defendant's motion to suppress is
10 reversed, and the case is remanded to the district court for further proceedings
11 consistent with this opinion.

12 {19} **IT IS SO ORDERED.**

13
14

MICHAEL E. VIGIL, Judge

15 **WE CONCUR:**

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17

JAMES J. WECHSLER, Judge

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19

M. MONICA ZAMORA, Judge