

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

2 Opinion Number: _____

3 Filing Date: **OCTOBER 28, 2015**

4 **NO. 34,047**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **LAMONT SWAIN,**

9 Defendant-Appellee.

10 **APPEAL FROM THE DISTRICT COURT OF DE BACA COUNTY**

11 **Matthew J. Sandoval, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 M. Anne Kelly, Assistant Attorney General

15 Albuquerque, NM

16 for Appellant

17 Garrett Law Firm, P.A.

18 Michael T. Garrett

19 Clovis, NM

20 for Appellee

1 **OPINION**

2 **ZAMORA, Judge.**

3 {1} The State of New Mexico appeals from an order granting a motion to suppress
4 evidence based on an unconstitutional sobriety checkpoint. The State raises a single
5 issue on appeal: whether the lack of advance publicity makes a sobriety checkpoint
6 unconstitutional, where the remainder of the factors in *City of Las Cruces v.*
7 *Betancourt*, 1987-NMCA-039, ¶ 13, 105 N.M. 655, 735 P.2d 1161, are met. We hold
8 that it does not and, therefore, reverse.

9 **I. BACKGROUND**

10 {2} The facts are largely undisputed. Defendant Lamont Swain was charged with
11 concealing identity, driving while under the influence of intoxicating liquor or drugs
12 (DWI), and four counts of possession of a controlled substance following his arrest
13 for refusing to show his driver's license at a sobriety checkpoint. Defendant filed a
14 motion to suppress evidence on the grounds the sobriety checkpoint was
15 unconstitutional because the State failed to comply with the final *Betancourt* factor
16 relating to advance publicity. *Id.*

17 {3} Sergeant Herbert Hinders of the New Mexico State Police prepared the plan
18 and supervised the checkpoint in De Baca County, between Santa Rosa and Fort
19 Sumner. Sergeant Hinders sent an e-mail to a radio station a month before the
20 scheduled checkpoint with a request to publicize the roadblock. He did not request

1 confirmation of the radio station’s receipt of his e-mail and did not know whether the
2 station received his e-mail. Sergeant Hinders also did not listen to the radio station
3 to confirm the checkpoint was publicized and did not seek publication in the county
4 newspaper.

5 **II. DISCUSSION**

6 {4} A sobriety checkpoint is a seizure. *State v. Bates*, 1995-NMCA-080, ¶ 9, 120
7 N.M. 457, 902 P.2d 1060 (stating “there is no question that a roadblock is a seizure”).
8 “Whether a search and seizure was constitutional is a mixed question of law and
9 fact.” *State v. Duran*, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836, *overruled*
10 *on other grounds by State v. Leyva*, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861.
11 “We review factual determinations by the trial court under a substantial evidence
12 standard.” *Duran*, 2005-NMSC-034, ¶ 19. “We review the lower court’s
13 determination of legal questions de novo.” *Id.*

14 {5} A sobriety checkpoint “is constitutionally permissible so long as it is
15 reasonable within the meaning of the fourth amendment as measured by its substantial
16 compliance with [eight guidelines].” *Betancourt*, 1987-NMCA-039, ¶ 16. The eight
17 factors include: “[(1) the r]ole of supervisory personnel[, (2) r]estrictions [on]
18 discretion of field officers[, (3) s]afety[, (4) r]easonable location[, (5) t]ime and

1 duration[, (6) i]ndicia of official nature of the roadblock[, (7) l]ength and nature of
2 detention[, and (8) a]dvance publicity.” *Id.* ¶ 13.

3 {6} The district court found that the checkpoint plan was compliant with all but the
4 advance publicity factor. The district court based its finding on the following facts:
5 (1) the radio station never received an e-mail from Sergeant Hinders, (2) Sergeant
6 Hinders did not verify that the e-mail had been opened or received, (3) Sergeant
7 Hinders did not have any personal knowledge of whether the checkpoint had been
8 publicized, (4) Sergeant Hinders did not seek to have the checkpoint publicized in the
9 county newspaper, and (5) the radio station from which Sergeant Hinders sought the
10 advance publicity did not reach the county in which the checkpoint was located. The
11 district court found that, while the State attempted to publicize the checkpoint in
12 advance, it did not act reasonably to provide advance publicity and, therefore, it did
13 not substantially comply with the *Betancourt* factors.

14 {7} For the purpose of discussion, we note that no evidence was presented
15 regarding the radio station’s broadcast range at trial. We also note that the only
16 mention of the advance publicity issue came in Defendant’s closing argument. We
17 therefore decline to accept the district court’s finding that “[a]t this point it’s
18 uncontroverted that the radio station that Sergeant Hinders attempted to publicize on
19 does not reach De Baca County.” Other than this exception, the district court’s factual

1 findings are supported by substantial evidence. However, Sergeant Hinders’ deficient
2 attempts to publicize are not the central issue to this appeal. The question before us
3 is whether a lack of advance publicity related to an otherwise *Betancourt*-compliant
4 roadblock renders the roadblock constitutionally invalid. We hold that it does not.

5 {8} In *Betancourt*, this Court analyzed a sobriety roadblock within the context of
6 the Fourth Amendment to the United States Constitution. *Betancourt*, 1987-NMCA-
7 039, ¶¶ 9, 14. We noted that because of the Fourth Amendment’s protections against
8 unreasonable searches and seizures, “the reasonableness of any roadblock will be
9 very closely scrutinized.” *Id.* ¶ 10. We presented eight guidelines to be considered in
10 determining the reasonableness of a roadblock and emphasized that “we do not
11 foreclose consideration of other relevant factors where appropriate and we hold that
12 no one guideline is necessarily dispositive of the issue[.]” *Id.* ¶ 13. Post-*Betancourt*,
13 two subsequent appellate decisions of this Court, discussed below, relate directly to
14 the advance publicity guideline. Guiding those decisions was our holding in
15 *Betancourt* where we noted, with regard to advance publicity, that “[t]he deterrence
16 value of any roadblock and its reasonableness for sobriety checks will be enhanced
17 if given widespread advance publicity.” *Id.* ¶ 13. In *Betancourt*, advance publicity
18 concerning the sobriety roadblocks was disseminated to a local radio station for
19 release.

1 {9} In *State v. Olaya*, 1987-NMCA-040, 105 N.M. 690, 736 P.2d 495, filed on the
2 same day as *Betancourt*, police officers were given permission to establish a
3 roadblock at a location of their choice. “They were required to use reflectors, marked
4 units, and a stop sign.” *Olaya*, 1987-NMCA-040, ¶ 3. They were to stop all privately
5 owned east bound vehicles in order to check for driver’s licenses, registration, and
6 proof of insurance. *Id.* There was no advance publicity. *Id.* ¶ 22. The Court applied
7 the *Betancourt* guidelines, noted the lack of advance publicity, and held that
8 “[b]ecause no one guideline is dispositive, and because there was substantial evidence
9 to support the [district] court’s conclusion that the officers in this case did not have
10 or [did not] exercise unbridled discretion [that] the roadblock was valid.” *Id.*

11 {10} In *Bates*, law enforcement sent out a news release to the media identifying
12 dates and location of the checkpoint. The defendant argued that the media either gave
13 the wrong location, or that the information was generalized when it was simply stated
14 that there would be stepped-up DWI checkpoints to deter drunk driving during the
15 holiday weekend. 1995-NMCA-080, ¶ 5. Consistent with *Betancourt*, the Court first
16 noted, “[i]n determining the reasonableness of a roadblock, all the factors must be
17 considered, and none is dispositive but the role of supervisory personnel and the
18 restrictions on discretion of field officers.” *Bates*, 1995-NMCA-080, ¶ 22. In
19 specifically addressing the advance publicity, the Court held that “[w]hether or not

1 there [was] advance publicity is not dispositive of the reasonableness of a DWI
2 roadblock[,]” and the facts in that case “were legally sufficient to show the
3 reasonableness of the roadblock under both the New Mexico and United States
4 Constitutions.” *Id.* ¶¶ 26-27 (citing *Betancourt*, 1987-NMCA-039, ¶ 13).

5 {11} We again affirmed this principle, four months after *Bates*, in *State v. Madalena*,
6 1995-NMCA-122, 121 N.M. 63, 908 P.2d 756. We declared that “the facts and
7 circumstances of each road block must be examined in light of the guidelines
8 articulated in *Betancourt*.” *Madalena*, 1995-NMCA-122, ¶ 33. In *Madalena*, the
9 parties did not contest the lack of advance publicity. *Id.* ¶ 32. Instead, the defendant
10 challenged the constitutionality of the entire practice of DWI checkpoints under
11 Article II, Section 4 and Article II, Section 10 of the New Mexico Constitution. *Id.*
12 ¶ 1. We held “that a sobriety checkpoint conducted in substantial compliance with the
13 eight *Betancourt* factors is constitutional under the New Mexico Constitution.” *Id.*
14 ¶¶ 26, 32.

15 {12} In the present case, Sergeant Hinders attempted, but failed, to comply with the
16 advance publicity requirement by e-mailing the radio station with a request for
17 publication of the checkpoint, though the radio station never received it. Sergeant
18 Hinders did not verify that the e-mail had been opened or received, did not have any
19 personal knowledge of whether the checkpoint had been publicized, nor did he seek

1 to have the checkpoint publicized in the county newspaper. Whether Sergeant
2 Hinders' attempt to generate advance publicity of this checkpoint satisfies the final
3 *Betancourt* factor is a question for another day.

4 {13} Based on our longstanding case law, a lack of advance publicity, without more,
5 is simply not sufficient to find that a DWI checkpoint constitutes an illegal seizure.
6 We take this opportunity to reaffirm *Bates* and *Olaya* inasmuch as each case stands
7 for the proposition that advance publicity, while beneficial from a deterrence
8 perspective, is not dispositive with respect to the illegal search and seizure analysis
9 under the Fourth Amendment and Article II, Section 10 of the New Mexico
10 Constitution. *See Bates*, 1995-NMCA-080, ¶ 26; *Olaya*, 1987-NMCA-040, ¶ 22.
11 While *Betancourt* stated that the reasonableness for a sobriety checkpoint would be
12 enhanced if given widespread advance publicity, we do not take this to mean that the
13 last factor is a mere disposable accessory to the other seven factors resulting in either
14 its wholesale disregard, or is it an invitation for potential abuse that would effectively
15 remove it from the *Betancourt* analysis entirely.

16 **CONCLUSION**

17 {14} The advance notice factor is merely one of eight factors to be considered in
18 determining the reasonableness of a checkpoint. Because no argument was made that
19 the remaining *Betancourt* factors were not met, and that the advance publicity factor

1 is not dispositive, we hold that the checkpoint was constitutional. For the forgoing
2 reasons, we reverse the district court's order granting Defendant's motion to suppress
3 evidence.

4 {15} **IT IS SO ORDERED.**

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M. MONICA ZAMORA, Judge

7 **WE CONCUR:**

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JAMES J. WECHSLER, Judge

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MICHAEL D. BUSTAMANTE, Judge