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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 30,043

10 **RUDY VALLEJOS,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

13 **Thomas J. Hynes, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 Jacqueline R. Medina, Assistant Attorney General

17 Albuquerque, NM

18 for Appellee

19 Chief Public Defender

20 B. Douglas Wood, Assistant Appellate Defender

21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **CASTILLO, Chief Judge.**

1 Defendant appeals the denial of his motion to suppress based on pretext. We
2 affirm.

3 **BACKGROUND**

4 In April 2009, Deputy “Tommy” Lopez of the San Juan County Sheriff’s
5 Department (Deputy Lopez) observed Defendant drive over the white line on the
6 right-hand side of the road and further observed that Defendant’s vehicle did not have
7 a license plate lamp. Deputy Lopez made a traffic stop during which Defendant was
8 asked to perform field tests for driving while under the influence of intoxicating
9 liquors (DWI). He failed them. Defendant was arrested and underwent breath testing.
10 The samples taken registered a BAC of 0.10 and 0.11. Defendant was charged with
11 DWI, failure to have an operating tail lamp, driving with a suspended or revoked
12 license, and possession of drug paraphernalia.

13 Defendant filed a motion to suppress all evidence underlying the charges on
14 grounds that the traffic stop was pretextual and, thus, illegal under the New Mexico
15 Constitution. According to Defendant, Deputy Lopez conducted surveillance on
16 Defendant prior to the stop, observed Defendant outside of a bar, formed a “hunch”
17 unsupported by reasonable suspicion that Defendant had been drinking, and later
18 stopped Defendant for failure to have a license plate lamp in order to pursue the more
19 serious “hunch” that Defendant was engaged in DWI. As authority for this argument,

1 Defendant relied exclusively on *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206
2 P.3d 143, *cert. quashed*, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

3 A hearing was held on Defendant's suppression motion. At that hearing, two
4 witnesses testified: Deputy Lopez and Defendant. A summary of their testimony
5 follows.

6 At midnight on April 18, 2009, Deputy Lopez was on duty and driving on
7 County Road 3100 when he encountered a white vehicle driving the opposite
8 direction. The vehicle was coming around a turn and Deputy Lopez observed the
9 passenger side tire cross over the white line and travel off the roadway. The vehicle
10 passed Deputy Lopez and, in his rear view mirror, he observed that the vehicle also
11 did not have a license plate lamp. Deputy Lopez turned his police unit around, began
12 pursuit, and illuminated his emergency lights once the roadway was sufficiently wide
13 to permit a safe traffic stop. After stopping the vehicle, Deputy Lopez approached,
14 spoke to Defendant, and observed that his speech was slurred and that he smelled of
15 alcohol. Another officer who heard Deputy Lopez announce over the radio that he
16 was making the stop, appeared on scene, performed the DWI field tests, and arrested
17 Defendant. In response to the district court's questioning, Deputy Lopez clarified that
18 he had neither seen Defendant's vehicle nor heard radio reports about Defendant's
19 vehicle prior to encountering Defendant driving the opposite direction on County

1 Road 3100.

2 Defendant testified that he went to Dino's bar and lounge shortly before 9:00
3 p.m. on the night of the stop. When he pulled into the parking lot at Dino's, he saw
4 two sheriff's vehicles. At approximately 11:00 p.m., Defendant and a relative left
5 Dino's in the relative's car and traveled to Farmington, New Mexico and ate at
6 Denny's. Defendant was driven back to Dino's an hour later to get his vehicle, at
7 which point he encountered a friend in the parking lot and struck up a conversation.
8 During the course of that conversation, a sheriff's vehicle pulled up. Although he was
9 uncertain, Defendant believes that Deputy Lopez was driving that vehicle. Defendant
10 stated that the officer observed him for roughly two minutes and then drove away.
11 Ten or fifteen minutes later, Defendant got into his car and proceeded to drive home.
12 As he was driving, a sheriff's vehicle passed him, then turned around, and began
13 pursuit. Once stopped, Defendant learned that it was Deputy Lopez.

14 The district court was unpersuaded by Defendant's pretext argument. The court
15 found Defendant's pretext theory—that Deputy Lopez engaged in surveillance, saw
16 Defendant in front of Dino's, predicted the route Defendant would travel home,
17 ambushed Defendant, and used the tail lamp violation as an excuse to pull Defendant
18 over for DWI—completely insensible and incredible. Moreover, the court concluded
19 that if Deputy Lopez observed erratic driving, he had legal justification to perform the

1 traffic stop so as to ascertain whether Defendant was impaired. The court concluded
2 that *Ochoa* was inapplicable, the stop was not pretextual, and denied the motion to
3 suppress.

4 His motion denied, Defendant entered a conditional plea in which he reserved
5 the right to appeal the district court's ruling on the suppression motion and pleaded
6 guilty to the DWI charge in return for dismissal of the other charges. At sentencing,
7 the district court determined that Defendant had at least three other DWI convictions
8 and sentenced him to an eighteen-month period of confinement to be followed by a
9 one-year period of mandatory parole supervision. This appeal followed.

10 **DISCUSSION**

11 Defendant argues on appeal, as he did below, that Deputy Lopez carried out an
12 illegal and unconstitutional pretextual stop. Relying exclusively on *Ochoa*, Defendant
13 argues that Deputy Lopez “used the license plate lamp violation as a pretense to
14 pursue his hunch that [Defendant] was committing DWI” and, as such, asks us to
15 reverse the district court and grant the motion to suppress.

16 We review a district court's ruling on a motion to suppress as a mixed question
17 of fact and law. *State v. Gutierrez*, 2004-NMCA-081, ¶ 4, 136 N.M. 18, 94 P.3d 18.
18 “[W]e observe the distinction between factual determinations which are subject to a
19 substantial evidence standard of review and application of law to the facts[,] which is

1 subject to de novo review.” *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206
2 P.3d 579 (alteration in original). We review the facts in a light most favorable to the
3 prevailing party, as long as the facts are supported by substantial evidence. *Id.*
4 “Resolution of factual conflicts, credibility and weight of evidence is particularly a
5 matter within the province of the trier of fact.” *State v. Werner*, 117 N.M. 315, 317,
6 871 P.2d 971, 973 (1994) (internal quotation marks and citation omitted). The
7 ultimate legal determination concerning the constitutional reasonableness of the
8 officer’s conduct—whether Deputy Lopez committed an illegal and unconstitutional
9 pretextual stop—is a question of law which we review de novo. *See State v. Attaway*,
10 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994), *modified on other grounds by*
11 *State v. Lopez*, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80.

12 In *Ochoa*, we defined a pretextual stop as “a detention supportable by reasonable
13 suspicion or probable cause to believe that a traffic offense has occurred, but is
14 executed as a pretense to pursue a ‘hunch,’ a different more serious investigative
15 agenda for which there is no reasonable suspicion or probable cause.” *Ochoa*, 2009-
16 NMCA-002, ¶ 25. “In performing a pretextual traffic stop,” we clarified, “a police
17 officer is stopping the driver, not to enforce the traffic code, but to conduct a criminal
18 investigation unrelated to the driving.” *Id.* ¶ 16 (internal quotation marks and citation
19 omitted). We also identified, in *Ochoa*, the burdens the parties must carry when a

1 defendant asserts pretext.

2 First, the trial court must determine whether there was reasonable
3 suspicion or probable cause for the stop. As usual, the [s]tate has the
4 burden of proof to justify the stop under an exception to the warrant
5 requirement. If the stop can be justified objectively on its face and the
6 defendant argues that the seizure was nevertheless unreasonable because
7 it was pretextual under the New Mexico Constitution, then the district
8 court must decide whether the officer's motive for [the stop] was
9 unrelated to the objective existence of reasonable suspicion or probable
10 cause. The defendant has the burden of proof to show pretext based on
11 the totality of the circumstances.

12 *Id.* ¶ 40 (second alteration in original) (internal quotation marks and citations
13 omitted). We apply this framework.

14 The State did prove, and the district court was satisfied, that Deputy Lopez had
15 reasonable suspicion to stop Defendant. *See State v. Aguilar*, 2007-NMCA-040, ¶ 9,
16 141 N.M. 364, 155 P.3d 769 (“To have reasonable suspicion . . . , a police officer must
17 be aware of specific, articulable facts that, when judged objectively, would lead a
18 reasonable person to believe a traffic offense has occurred or is occurring.”). Deputy
19 Lopez testified that he observed Defendant drive erratically—he witnessed
20 Defendant’s tire cross the white line and go off the roadway as Defendant was coming
21 around a turn. Then he saw that Defendant’s license plate was not illuminated. Both
22 are traffic offenses. *See* NMSA 1978, § 66-7-317(A) (1978) (stating that “a vehicle
23 shall be driven as nearly as practicable entirely within a single lane”); NMSA 1978,
24 § 66-3-805(C) (1978) (“Either a tail lamp or a separate lamp shall be so constructed

1 and placed as to illuminate with a white light the rear registration plate and render it
2 clearly legible from a distance of fifty feet to the rear.”). Based on the above
3 testimony, the State met its burden, and the burden then shifted to Defendant to show
4 that “the seizure was nevertheless unreasonable because it was pretextual under the
5 New Mexico Constitution.” *Ochoa*, 2009-NMCA-002, ¶ 40. As we describe below,
6 Defendant failed in this regard.

7 The question before us is whether the stop was pretextual. As we have stated,
8 a stop is pretextual when the real motive for the stop is “not to enforce the traffic code,
9 but to conduct a criminal investigation unrelated to the driving.” *Id.* ¶ 16 (internal
10 quotation marks and citation omitted). As we have explained, Defendant’s pretext
11 theory is that Lopez used the license plate lamp violation as a pretense to pursue his
12 hunch that, based on Defendant’s activity in the parking lot of a bar, Defendant would
13 be DWI if he drove. Evidence was presented at the hearing on Defendant’s motion
14 to suppress that cast doubt on the credibility and plausibility of this theory. Deputy
15 Lopez testified that he had not seen Defendant or his vehicle before observing
16 Defendant driving over the white line and testified that he stopped Defendant for two
17 reasons: crossing the white line as well as the lamp violation. Defendant emphasizes
18 that Deputy Lopez at one point stated that the lamp violation was the sole reason for
19 the stop. While Deputy Lopez did make this statement, at other times during his

1 testimony he stated that the stop was for the two reasons identified.

2 In reconciling the conflicting versions of the events preceding the traffic stop
3 in favor of the State, the district court stated that it neither believed nor was able to
4 make sense of Defendant’s pretext theory. We defer to the district court’s judgment
5 concerning credibility and the weight to be given evidence. *Werner*, 117 N.M. at 317,
6 871 P.2d at 973. Because the district court rejected the facts Defendant cited to
7 support his pretext theory, we need not further consider Defendant’s pretext argument.
8 *See Ochoa*, 2009-NMCA-002, ¶ 40 (“If the defendant has not placed substantial facts
9 in dispute indicating pretext, then the seizure is not pretextual.”). Defendant failed to
10 meet his burden and failed to establish that the seizure was pretextual.

11 **CONCLUSION**

12 For the foregoing reasons, the district court’s denial of the motion to suppress
13 is affirmed.

14 **IT IS SO ORDERED.**

15 _____
16 **CELIA FOY CASTILLO, Chief Judge**

1 **WE CONCUR:**

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3 _____
JAMES J. WECHSLER, Judge

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5 _____
LINDA M. VANZI, Judge