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

2 **STEPHEN RYAN,**

3 Appellant-Respondent,

4 v.

NO. 30,450

5 **STATE OF NEW MEXICO TAXATION**
6 **and REVENUE DEPARTMENT, MOTOR**
7 **VEHICLE DIVISION,**

8 Appellee-Petitioner.

9 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**

10 **George P. Eichwald, District Judge**

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14 for Appellee

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5 **MEMORANDUM OPINION**

6 **CASTILLO, Chief Judge.**

7 The State of New Mexico Taxation and Revenue Department, Motor Vehicle
8 Division (MVD) filed a writ of certiorari asking this Court to review the district
9 court's order reversing the administrative revocation of the driver's license of
10 Respondent Stephen Ryan (Driver). We granted the petition, and we now reverse the
11 district court's order.

12 **BACKGROUND**

13 The facts are not in dispute. On the evening of June 28, 2009, Sergeant Kent
14 was patrolling an area of Rio Rancho when he spotted Driver's car as it crossed the
15 right edge line of the road into a bike path and then swerved back to the left, crossing
16 the dotted line on the left side of the lane marker. Kent initiated a traffic stop. After
17 he pulled over, Driver inadvertently backed his car toward the officer's, requiring
18 Kent to put his vehicle in reverse to avoid being hit. Kent then approached Driver's
19 vehicle and noted that Driver's eyes were watery and bloodshot, and he detected an
20 odor of alcohol coming from the vehicle. Kent also testified that Driver seemed "out
21 of sorts" and that his speech was slurred.

1 During field sobriety tests (FSTs), Driver stated at times that he could not hear
2 or understand the instructions being given. Driver said he also experienced anxiety
3 and panic at that point, manifesting itself in a constricted field of vision, difficulty
4 hearing, and a shortness of breath. Driver also had a problem with balance during the
5 FSTs. Kent placed Driver under arrest at 2:10 a.m. Police records show that four
6 minutes earlier, at 2:06 a.m., a call was made for a tow truck, but Kent testified that
7 he did not make that call and that he placed Driver under arrest based on Driver's
8 performance on the FSTs. Driver was taken to the police station and was asked at
9 2:25 a.m. if he would submit to a blood-alcohol breath test. He refused, and Kent read
10 Driver the implied consent warning informing him that his license could be revoked
11 based on his failure to consent to the breath test. Driver then requested the
12 opportunity to arrange a blood test in the alternative; Kent agreed and provided Driver
13 with a space that contained a telephone and phone book. Around 3:45 a.m., Driver
14 stated a desire to take the breath test, more than an hour after he had refused it. Kent
15 turned down the request.

16 An MVD hearing officer issued an eight-page, single-spaced statement of
17 findings. The hearing officer determined that the call for the tow truck did not
18 constitute an unlawful arrest. The hearing officer further found that Driver failed to
19 demonstrate that he cured his first refusal to take the breath test by either his request

1 for an alternative blood test or by agreeing to the breath test more than an hour after
2 refusing the first one. Driver appealed the decision to the district court. The district
3 court reversed based on its determination that (1) Kent’s request for the tow truck
4 made the arrest unlawful and (2) Driver recanted his refusal to take the breath test by
5 agreeing to be tested eighty minutes after being read the implied-consent warning by
6 Kent. The district court determined that substantial evidence did not exist for the
7 hearing officer’s revocation order. This appeal by MVD followed.

8 **DISCUSSION**

9 **I. Standard of Review**

10 We apply the standard of review used by the district court. *See Romero v. Rio*
11 *Arriba Cnty. Comm’rs*, 2007-NMCA-004, ¶ 12, 140 N.M. 848, 149 P.3d 945 (“In
12 reviewing a decision of an administrative agency, we apply the same
13 statutorily-defined standard of review applied by the district court.”). “On review, it
14 is for the [district] court to determine only whether reasonable grounds exist for
15 revocation or denial of the person’s license or privilege to drive based on the record
16 of the administrative proceeding.” NMSA 1978, § 66-8-112(H) (2003). We are to
17 determine whether “there was sufficient evidence to uphold the administrative
18 agency’s decision.” *Groendyke Transp., Inc. v. State Corp. Comm’n*, 101 N.M. 470,
19 476, 684 P.2d 1135, 1141 (1984). “It is not the function of the [district] court to retry

1 the case” during its appellate review of an administrative hearing. *Id.* “The standard
2 of review for appeals from administrative agencies is whether substantial evidence in
3 the record as a whole supports the agency’s decision.” *Dep’t of Transp., Motor*
4 *Vehicle Div. v. Romero*, 106 N.M. 657, 659, 748 P.2d 30, 32 (Ct. App. 1987).
5 “Substantial evidence is evidence that a reasonable mind would recognize as adequate
6 to support the conclusions reached by a fact-finder.” *N.M. Mining Ass’n v. N.M.*
7 *Water Quality Control Comm’n*, 2007-NMCA-010, ¶ 30, 141 N.M. 41, 150 P.3d 991.
8 In reviewing an administrative decision for substantial evidence, “[t]he question is not
9 whether substantial evidence exists to support the opposite result, but rather whether
10 such evidence supports the result reached.” *Las Cruces Prof’l Fire Fighters & Int’l*
11 *Ass’n of Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329,
12 940 P.2d 177. The district court was obligated to defer to the hearing officer’s factual
13 and credibility determinations. *See State Bd. of Psychologist Exam’rs v. Land*, 2003-
14 NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. “Where a difference or conflict in the
15 evidence exists, a court should not substitute its opinion for that of the administrative
16 agency.” *Romero*, 106 N.M. at 659, 748 P.2d at 32. We presume that an agency’s
17 determination is correct. *See id.*

18 **II. The Hearing Officer Did Not Err in Finding That the Arrest of Driver Was**
19 **Lawful**

20 MVD first argues that the hearing officer’s finding of a lawful arrest is

1 supported by substantial evidence and that the district court erred in finding that
2 Driver was arrested once a request for a tow truck was made. Whether Driver was
3 lawfully arrested is a key issue because one of the elements MVD must prove in order
4 to revoke a driver's license for refusal to take a breath test is that the person was
5 arrested. *See* § 66-8-112(F)(2). Driver contends that the arrest was not lawful
6 because it was preceded by an unlawful detainer or seizure. He argues that once a tow
7 truck was called, he was seized and under arrest before police officers had established
8 probable cause to do so.

9 An arrest occurs whenever a police officer restrains an individual's freedom to
10 leave the scene. *See State v. Harbison*, 2007-NMSC-016, ¶ 11, 141 N.M. 392, 156
11 P.3d 30. "Our courts have held that a restraint on a person's freedom . . . can result
12 either from the application of physical force or by a showing of authority." *Id.*
13 "When determining whether a person is seized[,] we consider all of the circumstances
14 surrounding the incident in order to determine whether a reasonable person would
15 have believed that he [or she] was not free to leave." *State v. Jason L.*,
16 2000-NMSC-018, ¶ 15, 129 N.M. 119, 2 P.3d 856 (second alteration in original)
17 (internal quotation marks and citation omitted). In determining whether a reasonable
18 person would feel free to leave, we look at the conduct of police, the "person of the
19 individual citizen," and the physical surroundings at the scene. *Id.*

1 In the case before us, we must determine whether the district court was correct
2 in determining that the calling of a tow truck resulted in the premature seizure of
3 Driver, rendering his arrest unlawful. We begin with Driver’s legal arguments for his
4 position that the calling for a tow truck “is proof of a pre-investigation determination
5 of arrest.” Driver provides one legal citation for the proposition that the calling of a
6 tow truck constitutes an arrest: *Boone v. State*, 105 N.M. 223, 227, 731 P.2d 366, 370
7 (1986) (“A person is arrested when his freedom of action is restricted by a police
8 officer and he is subject to the control of the officer.”), *limited on other grounds by*
9 *State v. Sims*, 2010-NMSC-027, ¶ 12, 148 N.M. 330, 236 P.3d 642. However, *Boone*
10 said nothing about the seizure implications of a police call for a tow truck; it merely
11 held that it is unlawful for an intoxicated person to steer a vehicle being towed by a
12 motor vehicle. *See id.* at 226, 731 P.2d at 369. Driver cites to no authority, and we
13 have found none, for the idea that a call for a tow truck without the knowledge of the
14 arresting officer or the eventual arrestee constitutes a seizure such that it rises to the
15 level of an arrest requiring probable cause. Driver also cites to *State v. Jones*, 2002-
16 NMCA-019, 131 N.M. 586, 40 P.3d 1030, to support his contention that “any tow
17 request before completion of all the standard [FSTs] makes the arrest unlawful.”
18 *Jones*, which was abrogated by *State v. Bomboy*, 2008-NMSC-029, 144 N.M. 151,
19 184 P.3d 1045, stands for the general proposition that warrantless seizures are

1 arrest, correct?

2 [Kent]: . . . [Y]eah, that would be four minutes before the arrest.

3 Nowhere in that exchange does Kent say he called for a tow truck or knew, prior to
4 the 2:10 arrest of Driver, that one had been called; he merely gave deference to the
5 police department's call records in acknowledging that a tow truck apparently had
6 been called by someone. It appears the district court reweighed and reinterpreted the
7 evidence and came to a conclusion not supported by the record. In contrast, the
8 hearing officer's finding that there was no evidence that Kent called for a tow truck
9 is an accurate reflection of the record. Consequently, we conclude that the evidence
10 does not support the district court's conclusion regarding the calling of the tow truck.

11 Driver further argues that he was unable to leave the scene and that "his *means*
12 . . . of leaving the scene were effectively taken from him before the completion of the
13 DWI investigation." Driver points to nothing in the record to show that he was
14 detained simply as a consequence of an unknown person calling for a tow truck during
15 the FSTs and four minutes before the arrest was effectuated. Because there is no
16 evidence that Kent made the call for a tow truck or that either he or Driver knew that
17 one had been requested, there is no basis for Driver's argument.

18 The focus of our inquiry is whether Kent had reasonable suspicion to conduct
19 a traffic stop and, later, probable cause when he placed Driver under arrest at 2:10
20 a.m. "A reasonable suspicion is a particularized suspicion, based on all the

1 circumstances that a particular individual, the one detained, is breaking, or has broken,
2 the law.” *State v. Rivas*, 2007-NMCA-020, ¶ 7, 141 N.M. 87, 150 P.3d 1037 (internal
3 quotation marks and citation omitted). “Probable cause exists when the facts and
4 circumstances within the officers’ knowledge, and of which they had reasonably
5 trustworthy information, are sufficient to warrant a man of reasonable caution to
6 believe that an offense has been, or is being, committed.” *State v. Duffy*, 1998-
7 NMSC-014, ¶ 69, 126 N.M. 132, 967 P.2d 807 (internal quotation marks and citation
8 omitted), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ___
9 N.M. ___, 275 P.3d 110. In the case before us, Kent testified that he observed
10 Driver’s vehicle driving erratically, to the point where the officer had to move his own
11 vehicle to avoid getting hit. Kent stopped the vehicle and noticed that Driver had
12 bloodshot watery eyes, and he noticed the smell of alcohol in Driver’s vehicle. Kent
13 commenced FSTs, at which time he noticed that Driver’s speech was slurred. Driver
14 did not successfully complete the tests. The hearing officer below determined that by
15 this point in the investigation, which itself was supported by reasonable suspicion,
16 probable cause existed to arrest Driver, making it irrelevant that someone called a tow
17 truck. *See, e.g., State v. Granillo-Macias*, 2008-NMCA-021, ¶ 12, 143 N.M. 455, 176
18 P.3d 1187 (holding that the odor of alcohol, lack of balance at the vehicle, and failure
19 to satisfactorily perform field sobriety tests supported an objectively reasonable belief

1 that the defendant had been driving while intoxicated, and thus constituted probable
2 cause to arrest); *State v. Jones*, 1998-NMCA-076, ¶ 10, 125 N.M. 556, 964 P.2d 117
3 (concluding that the officer had probable cause to arrest for DWI when the officer
4 noticed bloodshot and watery eyes, slurred speech, and a strong odor of alcohol, when
5 the defendant admitted to having drunk two beers, swayed when he was talking to the
6 officer, and failed the field sobriety tests); *State v. Ruiz*, 120 N.M. 534, 535, 540, 903
7 P.2d 845, 846, 851 (Ct. App. 1995) (holding that probable cause existed where police
8 observed the defendant speeding and weaving, where the defendant admitted to
9 having been drinking, when the officer noticed bloodshot and watery eyes, slurred
10 speech, and a smell of alcohol, and when the results of the field sobriety tests were
11 mixed), *abrogated on other grounds by State v. Martinez*, 2007-NMSC-025, ¶ 21, 141
12 N.M. 713, 160 P.3d 894.

13 We conclude that substantial evidence existed for the hearing officer to find that
14 the request of a tow truck by an unknown person did not constitute a seizure of Driver
15 minutes before his arrest. Nothing in the record indicates that Driver felt that he was
16 being detained specifically because a tow truck had been called. Additionally, the
17 record supports the determination that Kent had reasonable suspicion to conduct a
18 traffic stop and also probable cause to arrest Driver. Thus, the evidence was sufficient
19 to show that Driver was lawfully arrested and subject to the revocation of his license

1 under the statute for refusing the breath test. It was error for the district court to
2 reweigh the evidence below and to find otherwise. *See Romero*, 106 N.M. at 660, 748
3 P.2d at 33 (“It is not the proper function of either this court or the district court to
4 reweigh the evidence and to substitute its judgment for that of the hearing officer, so
5 long as the agency decision is supported by the record.”).

6 **III. Driver Did Not Cure His Refusal to Take the Breath Test**

7 The hearing officer also found that Driver refused to take a breath test when
8 requested to do so by Kent. MVD argues that the district court erred in reversing that
9 decision and in finding that Driver made up for his refusal to take a breath test by
10 finally agreeing to do so eighty minutes after his original refusal. Driver argues that
11 immediately after he refused the breath test, Kent agreed to allow him to arrange a
12 blood test but did not inform him that such an alternative test would not cure his
13 refusal to take the breath test; thus, Driver reasons, his initial refusal was swiftly
14 recanted as required by New Mexico law.

15 New Mexico, like all states, has sought to combat the evils of drunk driving by
16 enacting the Implied Consent Act, by which anyone who operates a motor vehicle “is
17 deemed to have given consent to a chemical test to determine alcoholic content of his
18 breath, blood, or urine.” *In re McCain*, 84 N.M. 657, 660, 506 P.2d 1204, 1207
19 (1973); *see also* NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2007).

1 “One purpose is to deter driving while intoxicated. Another purpose is to aid in
2 discovering and removing from the highways the intoxicated driver. These purposes
3 are valid and well within the proper scope of the state’s police powers.” *McCain*, 84
4 N.M. at 660, 506 P.2d at 1207. The State has a “compelling public interest in
5 eradicating DWI occurrences and the potentially deadly consequences” of the crime.
6 *City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708, 242 P.3d 275.
7 Such legislation has been upheld in the face of due process challenges. *See McCain*,
8 84 N.M. at 660-661, 506 P.2d at 1207-08.

9 New Mexico’s statute provides:

10 Any person who operates a motor vehicle within this state shall be
11 deemed to have given consent, subject to the provisions of the Implied
12 Consent Act . . . , to chemical tests of his breath or blood or both,
13 approved by the scientific laboratory division of the department of health
14 pursuant to the provisions of [NMSA 1978,] Section 24-1-22 [(2003)] as
15 determined by a law enforcement officer, or for the purpose of
16 determining the drug or alcohol content of his blood if arrested for any
17 offense arising out of the acts alleged to have been committed while the
18 person was driving a motor vehicle while under the influence of an
19 intoxicating liquor or drug.

20 Section 66-8-107(A). The test is to be conducted at the behest of the police officer:

21 “A test of blood or breath or both . . . shall be administered at the direction of a law
22 enforcement officer having reasonable grounds to believe the person to have been
23 driving a motor vehicle within this state while under the influence of intoxicating
24 liquor or drug.” Section 66-8-107(B). The statute gives the MVD the authority to

1 revoke a driver's license if a person refuses to consent to chemical testing:

2 The department, upon receipt of a statement signed under penalty of
3 perjury from a law enforcement officer stating the officer's reasonable
4 grounds to believe the arrested person had been driving a motor vehicle
5 within this state while under the influence of intoxicating liquor or drugs
6 and that, upon request, the person refused to submit to a chemical test
7 after being advised that failure to submit could result in revocation of the
8 person's privilege to drive, shall revoke the person's New Mexico
9 driver's license or any nonresident operating privilege for a period of one
10 year or until all conditions for license reinstatement are met, whichever
11 is later.

12 Section 66-8-111(B). Thus, if a person refuses to submit to a test and has been
13 advised that failure to do so could lead to revocation of the person's driver's license,
14 MVD shall revoke their license for at least a year.

15 We have previously stated that an intoxicated driver may not negotiate with the
16 officer the type of test to be administered; rather, the driver must submit to whatever
17 form of chemical test requested by the officer. *See Fugere v. Taxation & Revenue*
18 *Dep't, Motor Vehicle Div.*, 120 N.M. 29, 32, 897 P.2d 216, 219 (Ct. App. 1995). In
19 *Fugere*, the driver demanded more than once on taking a breath test on a machine at
20 the station, while the officer insisted that the test be administered using the machine
21 in the officer's vehicle. *Id.* We rejected the driver's argument, stating:

22 The Act provides that a motorist consents to "chemical tests of his breath
23 or blood, *as determined by a law enforcement officer.*" To grant
24 Fugere's contention would render this mandatory provision meaningless.

25 Fugere's refusal to take Officer Romero's test, accompanied by his

1 consent to be tested on the machine at the police station, was, at best, a
2 conditional consent. A conditional consent is a refusal to take the test.

3 *Id.* at 34, 897 P.2d at 221 (citation omitted). We concluded: “By failing to submit to
4 the breath test requested by Officer Romero, Fugere’s actions constituted a refusal
5 under the Act, irrespective of his offer to take the test on the machine at the police
6 station.” *Id.* at 35, 897 P.2d at 222. As in *Fugere*, Driver’s refusal to take the breath
7 test as directed by Kent and his offer to instead arrange a blood test at best constitute
8 a conditional consent, which fails to qualify as submitting to a chemical test.

9 The district court, upon review, found that Driver cured his refusal with his
10 subsequent consent to take the breath test requested by Kent more than an hour after
11 his initial refusal. However, a driver’s reconsideration of a refusal must be relatively
12 immediate and “never more than a matter of minutes.” *In re Suazo*, 117 N.M. 785,
13 793, 877 P.2d 1088, 1096 (1994). The driver’s change of mind and acceptance of the
14 offer to submit to the test must be akin to the driver realizing that he or she had made
15 “a rash, unconsidered choice.” *Fugere*, 120 N.M. at 35, 897 P.2d 222. The New
16 Mexico Supreme Court established a five-factor test to determine whether a driver
17 cured an initial refusal:

18 A motorist will be permitted to rescind his initial refusal

- 19 (1) when he does so before the elapse of the reasonable
20 length of time it would take to understand the consequences
21 of his refusal;

1 (2) when such a test would still be accurate;

2 (3) when testing equipment or facilities are still readily
3 available;

4 (4) when honoring a request for a test, following a prior
5 first refusal, will result in no substantial inconvenience or
6 expense to the police; and

7 (5) when the individual requesting the test has been in
8 police custody and under observation for the whole time
9 since his arrest.

10 *Suazo*, 117 N.M. at 793, 877 P.2d at 1096. The first prong serves the purpose of
11 “offering the flustered motorist a fair chance to understand his or her rights.” *Id.*

12 In the case before us, Driver’s recantation came eighty minutes after the initial
13 refusal, well beyond the “reasonable length of time” defined in *Suazo* as “never more
14 than a matter of minutes.” And no matter how promptly Driver offered to take a blood
15 test as an alternative, such an action does not cure his refusal to submit to the breath
16 test. Thus, there was a legal basis for the hearing officer to determine that Driver
17 refused to submit to a breath test, and the district court’s conclusion is inconsistent
18 with New Mexico law.

19 Finally, Driver argues that he was not given a reasonable opportunity to obtain
20 an alternative test. The right to obtain an alternative test is statutory:

21 The person tested shall be advised by the law enforcement officer of the
22 person’s right to be given an opportunity to arrange for a physician,
23 licensed professional[,] or practical nurse or laboratory technician or

1 technologist who is employed by a hospital or physician of his own
2 choosing to perform a chemical test in addition to any test performed at
3 the direction of a law enforcement officer.

4 Section 66-8-109(B). In *Jones*, 1998-NMCA-076, ¶ 24, we stated: “[O]ur statute
5 does not guarantee the arrestee an additional test will be performed, but only that the
6 arrestee will be given a reasonable opportunity to arrange for an additional test.”

7 In the case before us, the hearing officer found that Driver failed to show that
8 he qualifies under the statute because, having refused the breath test, he was not a
9 “person tested” as articulated by the wording of the statute. We agree with the hearing
10 officer’s interpretation of the statute’s plain language. Further, even if Driver were
11 covered by the statute he must show that Kent failed to provide him with a reasonable
12 opportunity to secure an alternative test. In *Jones*, we found that a reasonable
13 opportunity was not afforded because the motorist was denied access to a telephone
14 to call his doctor. *Id.* ¶ 25. While *Jones* stopped short of saying that providing access
15 to a telephone would be sufficient, we conclude that Kent’s provision of a secluded
16 space that contained a telephone and phone book for Driver to use adequately
17 distinguishes the facts of this case from the facts in *Jones*.

18 In sum, we conclude that the district court erred in overturning the hearing
19 officer’s finding that Driver refused to take the breath test and failed to cure that
20 refusal.

1 **CONCLUSION**

2 For the foregoing reasons, we reverse the district court and remand with
3 directions to enter an order affirming the decision of MVD.

4 **IT IS SO ORDERED.**

5
6

CELIA FOY CASTILLO, Chief Judge

7 **WE CONCUR:**

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9
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JAMES J. WECHSLER, Judge

11
12

LINDA M. VANZI, Judge