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

2       **TYSON YAZZIE,**

3             Petitioner-Appellant,

4       v.

**NO. 30,871**

5       **MOTOR VEHICLE DIVISION,**  
6       **DEPARTMENT OF TAXATION AND**  
7       **REVENUE, STATE OF NEW MEXICO,**  
8       **KEN ORTIZ, DIRECTOR,**

9             Respondent-Appellee.

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

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

12       Titus & Murphy Law Firm  
13       Victor A. Titus  
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15       for Appellant

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19       for Appellee

20                                       **MEMORANDUM OPINION**

21       **VIGIL, Judge.**

1 This case raises issues controlled by the New Mexico Supreme Court's recent  
2 decision in *Schuster v. State of New Mexico Department of Taxation and Revenue*,  
3 2012-NMSC-\_\_\_, \_\_\_ P.3d \_\_\_ (No. 32,942, July 26, 2012). Finding no error, we  
4 affirm.

5 **I. BACKGROUND**

6 Tyson Yazzie (Driver) was arrested on suspicion of driving while intoxicated  
7 (DWI), and his driver's license was subsequently revoked by the Motor Vehicle  
8 Division (MVD) after a revocation hearing, pursuant to the Implied Consent Act,  
9 NMSA 1978, Sections 66-8-105 to -112 (1978, as amended through 2010). Because  
10 this is a memorandum opinion and the parties are familiar with the facts and  
11 procedural background, we reserve discussion of the pertinent facts within the context  
12 of Driver's arguments.

13 **II. ANALYSIS**

14 Driver raises four issues on appeal: (1) that the MVD improperly decided the  
15 constitutionality of the traffic stop and that the district court was required to conduct  
16 a de novo hearing on those issues; (2) that reasonable suspicion did not exist to  
17 conduct a traffic stop and Driver was therefore unlawfully seized; (3) that probable  
18 cause did not exist for Driver's subsequent arrest; and (4) that the officer unlawfully

1 conducted a pretextual traffic stop. We address each argument in turn, applying a  
2 whole record review to the MVD’s decision to determine whether substantial  
3 evidence supports the MVD’s findings. *See Miller v. Bd. of Cnty. Comm’rs*,  
4 2008-NMCA-124, ¶ 16, 144 N.M. 841, 192 P.3d 1218 (“This Court applies the same  
5 statutorily defined standard of review as the district court. The district court may  
6 reverse an administrative decision only if it determines that the administrative entity  
7 acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by  
8 substantial evidence in the whole record; or if the entity did not act in accordance with  
9 the law.” (alterations, internal quotation marks, and citations omitted)).

10 **A. The District Court Properly Reviewed the MVD Decision in Its Appellate**  
11 **Capacity**

12 We stayed this case pending our Supreme Court’s resolution of *Schuster*, 2012-  
13 NMSC-\_\_\_\_. *Schuster* holds that with respect to license revocation proceedings, the  
14 MVD must make a determination as to whether a traffic stop was constitutional and  
15 that the district court reviews that decision in its appellate jurisdiction. *See id.* ¶ 8.  
16 Because the MVD and the district court acted consistent with the directives laid out  
17 by our Supreme Court in *Shuster*, we find no error on this issue. Counsel for Driver  
18 was also defense counsel in *Schuster*, and therefore is familiar with the facts of both

1 *Schuster* and this case. As this is a memorandum opinion, we do not engage in any  
2 further discussion on this issue.

3 **B. Constitutionality of Driver’s Stop and Arrest**

4 Driver argues that the MVD erred in concluding both that his traffic stop  
5 initiated by the officer was supported by reasonable suspicion and that probable cause  
6 existed for his subsequent arrest for DWI. *See State v. Jason L.*, 2000-NMSC-018,  
7 ¶ 14, 129 N.M. 119, 2 P.3d 856 (“An arrest must be supported by probable cause and  
8 an investigatory stop must be supported by reasonable suspicion.”). These issues are  
9 “reviewed on appeal as [] mixed question[s] of law and fact in which factual questions  
10 are considered for substantial evidence and the application of law to the facts is  
11 reviewed de novo.” *Schuster*, 2012-NMSC-\_\_\_\_, ¶ 23.

12 **1. The Officer Had Reasonable Suspicion to Stop Driver**

13 We have thoroughly reviewed the record and conclude that substantial evidence  
14 supported the MVD’s finding that the stop was constitutional based on the officer’s  
15 testimony that he witnessed Driver violate the traffic lane provision of the Motor  
16 Vehicle Code. *See* NMSA 1978, § 66-7-317(A) (1978) (“Whenever any roadway has  
17 been divided into two or more clearly marked lanes for traffic . . . a vehicle shall be  
18 driven as nearly as practicable entirely within a single lane and shall not be moved  
19 from such lane until the driver has first ascertained that such movement can be made

1 with safety[.]”); *State v. Jacquez*, 2009-NMCA-124, ¶ 5, 147 N.M. 313, 222 P.3d 685  
2 (providing that a violation of the Motor Vehicle Code provides an officer with  
3 reasonable suspicion to conduct an investigatory stop). Although Driver argues on  
4 appeal that the officer’s mistake of law cannot provide the basis for a constitutional  
5 stop, he fails to establish how the officer’s testimony that he observed Driver fail to  
6 maintain a traffic lane was not a violation of Section 66-7-317 of the Motor Vehicle  
7 Code. *See State v. Hubble*, 2009-NMSC-014, ¶¶ 30-32, 146 N.M. 70, 206 P.3d 579  
8 (stating that where there was no evidence that the police officer misunderstood the  
9 breadth of the turn signal section of the Motor Vehicle Code, there was no mistake of  
10 law, and characterizing an officer’s misunderstanding of the circumstances of the  
11 violation as a mistake of fact, distinguishing it from a mistake of law). Accordingly,  
12 we conclude that the traffic stop was supported by reasonable suspicion.

13 **2. The Officer Had Probable Cause to Arrest Driver**

14 Based upon our thorough review of the record, we also conclude that sufficient  
15 evidence supported the MVD’s finding that the officer had probable cause to arrest  
16 Driver on suspicion of DWI. Probable cause exists when “facts and circumstances  
17 within the officer’s knowledge, or on which the officer has reasonably trustworthy  
18 information, are sufficient to warrant someone of reasonable caution to believe that

1 an offense has been or is being committed.” *State v. Galloway*, 116 N.M. 8, 11, 859  
2 P.2d 476, 479 (Ct. App. 1993).

3         The officer testified that Driver’s breath smelled of alcohol; he was unsteady  
4 on his feet when stepping out of the vehicle and had to use the vehicle for balance; had  
5 slowed demeanor; had red, bloodshot watery eyes; and that Driver admitted to having  
6 consumed three beers at the Three Rivers Brewery prior to driving. Driver also  
7 refused to perform field sobriety tests, which can support an inference of  
8 consciousness of guilt. *See State v. Wright*, 116 N.M. 832, 835, 867 P.2d 1214, 1217  
9 (Ct. App. 1993) (stating that refusal to submit to a breath test is admissible to support  
10 an inference of consciousness of guilt). Based on this evidence, we conclude that  
11 sufficient evidence was presented to support probable cause for an arrest on suspicion  
12 of DWI. *See State v. Hernandez*, 95 N.M. 125, 126, 619 P.2d 570, 571 (Ct. App.  
13 1980) (concluding that the officer had probable cause to arrest where the defendant  
14 had driven in the officer’s presence, and the officer noted that the defendant smelled  
15 of alcohol and had slurred speech).

16 **D. Driver Did Not Preserve His Argument That the Stop Was Pretextual**

17         Driver also contends that the officer’s traffic stop of his vehicle was pretextual  
18 and unconstitutional under *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206 P.3d  
19 143. Pursuant to *Schuster*, the constitutionality of the stop must be decided by the

1 MVD, and any objections to the constitutionality of the stop must also be raised  
2 before the MVD to preserve the issue for appellate review by the district court. *See*  
3 *Schuster*, 2012-NMSC-\_\_\_, ¶ 8. Defense counsel did not argue in the MVD hearing  
4 that the stop was pretextual and, instead, first raised this issue in the district court.  
5 *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (“To  
6 preserve an issue for review on appeal, it must appear that appellant fairly invoked a  
7 ruling of the trial court on the same grounds argued in the appellate court.”). Because  
8 Driver failed to preserve this issue before the MVD, we decline to address it.

9 **III. CONCLUSION**

10 We affirm.

11 **IT IS SO ORDERED.**

12  
13 \_\_\_\_\_  
**MICHAEL E. VIGIL, Judge**

14 **WE CONCUR:**

15 \_\_\_\_\_  
16 **RODERICK T. KENNEDY, Judge**

17 \_\_\_\_\_  
18 **TIMOTHY L. GARCIA, Judge**