

STATE V. NUNEZ-TERRAZAS

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STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
CESAR NUNEZ-TERRAZAS,
Defendant-Appellee.

No. 32,544

COURT OF APPEALS OF NEW MEXICO

December 4, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Ross C.
Sanchez, District Judge

COUNSEL

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JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge,
MICHAEL E. VIGIL, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} The State of New Mexico appeals the district court's order granting Defendant Cesar Nunez-Terrazas' motion to suppress evidence seized as a result of a traffic stop.

The State contends that the district court erred in concluding that the traffic stop was not supported by reasonable suspicion. We affirm.

BACKGROUND

{2} Defendant was charged with one count of trafficking (by possession with intent to distribute), contrary to NMSA 1978, Section 30-31-20(A)(3) (2006), following a traffic stop. The following details regarding the traffic stop were provided in the incident report filed by Officer Phillip Olivas. On April 14, 2011, Officer Olivas was on random patrol in an Albuquerque neighborhood when he observed two vehicles stopped in the middle of a street. The vehicles were parallel to each other, facing opposite directions, and it appeared to the officer that the individuals in the vehicles were interacting with each other. As the officer's patrol car turned onto the street that the vehicles were on and began to approach them, the two vehicles drove off in their respective directions. The officer proceeded to follow the vehicle that Defendant was driving for several blocks. He observed Defendant's vehicle drive left of center multiple times. The officer then initiated a traffic stop of Defendant's vehicle. During the traffic stop, Defendant gave Officer Olivas consent to search his vehicle during which cocaine was found under the front passenger seat.

{3} Although Officer Olivas did not charge Defendant with violating any traffic laws as a result of the traffic stop, he indicated during pre-trial interviews that he observed Defendant commit two traffic offenses prior to the initiation of the traffic stop: (1) obstructing traffic when Defendant's vehicle was stopped parallel to the other vehicle, and (2) failure to maintain a traffic lane when Defendant's vehicle drove left of center multiple times.

{4} Defendant filed a motion to suppress the evidence seized from his vehicle on the ground that Officer Olivas lacked reasonable suspicion to initiate the traffic stop. Because Defendant was not charged with violating a municipal ordinance or state statute, Defendant's suppression motion and the subsequent pleadings filed by the parties referenced various traffic-related statutes and city ordinances that could have been violated based on Officer Olivas' statement during pre-trial interviews that he observed Defendant commit two traffic violations prior to initiation of the traffic stop.

{5} In his suppression motion, Defendant argued that there was no reasonable suspicion for the stop because Defendant did not obstruct traffic under the Albuquerque, N.M., Rev. Ordinances ch. 8, art. II, § 8-2-1-33 (1974) (the Ordinance) (stating that it is unlawful for a vehicle on any public way to stand "in such a manner as to obstruct the free use of such public way"). Defendant also contended that there was no reasonable suspicion for driving left of center of the roadway because NMSA 1978, Section 66-7-317(A) (1978) of the New Mexico Motor Vehicle Code applies only where there are marked lanes of traffic, and in this case, Defendant did not drive on any marked roads while being followed by Officer Olivas. See *id.* (providing that "a vehicle shall be driven as nearly as practicable entirely within a single lane" on roadways divided into two or more clearly marked traffic lanes).

{6} The State responded to Defendant's suppression motion by arguing that reasonable suspicion existed for the traffic stop based on the two traffic offenses observed by Officer Olivas. Specifically, the State argued that Defendant obstructed traffic in violation of the Ordinance and NMSA 1978, Section 66-7-349(A) (1999) (providing that "[u]pon any highway outside of a business or residence district, no person shall stop...a vehicle...upon the paved or main-traveled part of the highway when it is practicable to stop...the vehicle off such part of the highway"). The State further argued that Defendant's alleged act of driving left of center multiple times violated NMSA 1978, Section 66-7-308 (1978), or NMSA 1978, Section 66-7-313 (1978). See § 66-7-308 (requiring vehicles to be driven upon the right half of a roadway where practicable); see also § 66-7-313 (listing conditions under which a vehicle is not to be driven on the left side of a roadway).

{7} The district court held a hearing on Defendant's motion to suppress on October 26, 2012. At the hearing, Officer Olivas and Mauricio Miramontes, a passenger in Defendant's vehicle, testified as to the circumstances surrounding the traffic stop. We will discuss witness testimony from the suppression hearing as necessary in our discussion. Following the hearing, the district court entered an order granting Defendant's motion to suppress, finding that "the stop of...Defendant's vehicle was not supported by reasonable suspicion." The State appeals from this order.

STANDARD OF REVIEW

{8} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Ketelson*, 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957. First, a reviewing court looks "for substantial evidence to support the trial court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861. "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of a search or seizure." *State v. Sewell*, 2009-NMSC-033, ¶ 12, 146 N.M. 428, 211 P.3d 885.

DISCUSSION

{9} The sole issue raised in this appeal is whether the district court erred in concluding that the traffic stop was not supported by reasonable suspicion. "Before a police officer makes a traffic stop, he must have a reasonable suspicion of illegal activity." *State v. Anaya*, 2008-NMCA-020, ¶ 6, 143 N.M. 431, 176 P.3d 1163. Reasonable suspicion is "a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856. "Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts." *State v. Flores*, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. "The test is an objective one. The subjective belief of the officer does not in itself affect the validity of the stop; it is the evidence known to the officer that counts, not the

officer's view of the governing law." *State v. Muñoz*, 1998-NMCA-140, ¶ 9, 125 N.M. 765, 965 P.2d 349.

{10} This Court has previously recognized that the violation of a traffic law can provide police officers with the requisite reasonable suspicion to initiate a traffic stop. See *State v. Vandenberg*, 2002-NMCA-066, ¶ 17, 132 N.M. 354, 48 P.3d 92 (stating that "[a] police officer may stop a vehicle if he has an objectively reasonable suspicion that the motorist has violated a traffic law"), *rev'd on other grounds*, 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19; see also *State v. Vargas*, 1995-NMCA-091, ¶ 11, 120 N.M. 416, 902 P.2d 571 (recognizing that a violation of the Motor Vehicle Code can provide officers with the requisite reasonable suspicion to conduct an investigatory stop). In the present case, the State argues that reasonable suspicion existed for the traffic stop of Defendant's vehicle because Officer Olivas observed Defendant commit at least two distinct traffic violations prior to the initiation of the stop: (1) Defendant's vehicle stopping parallel to the other vehicle on the roadway and obstructing traffic while doing so; and (2) Defendant's vehicle crossing left of the center of the roadway multiple times. The district court disagreed with the State's argument below based on the testimony presented at the hearing, and we turn therefore to consider whether the district court's ruling was erroneous with respect to each traffic offense.

1. Obstructing Traffic

{11} The State contends that reasonable suspicion existed for the traffic stop based on Officer Olivas' testimony that Defendant was obstructing traffic while his car was stopped parallel to the other vehicle. In the proceedings before the district court, the State pointed to the Ordinance and Section 66-7-349(A) as the applicable traffic laws that were violated based on the officer's testimony.

{12} On appeal, the State does not make an argument based on either the Ordinance or Section 66-7-349(A). Instead, it argues for the first time on appeal that the statute at issue here is NMSA 1978, Section 66-3-852 (1978). The State's reliance on this particular provision is problematic for two reasons. First, it appears that the State failed to preserve this argument for appellate review. See Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"). Second, Section 66-3-852 does not apply to the type of vehicle that Defendant was driving in this case. See NMSA 1978, § 66-3-851(A) (1978) (indicating that Section 66-3-852 applies to a "bus, truck, truck tractor, road tractor and every driven vehicle in driveway-towaway operations . . ."). Nevertheless, we do observe that Section 66-3-852 contains similar language to that of Section 66-7-349(A). Section 66-3-852 provides that:

No motor vehicle shall be stopped, parked or left standing, whether attended or unattended, *upon the traveled portion of any highway outside of a business or residence district*, when it is practicable to stop, park or leave such vehicle off the traveled portion of the highway.

(Emphasis added.) Section 66-7-349(A) states that:

Upon any highway outside of a business or residence district, no person shall stop, park or leave standing a vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park or leave the vehicle off such part of the highway[.]

(Emphasis added.)

{13} Even if we were to set aside our concerns regarding the State's reliance on Section 66-3-852 on appeal in light of the similarity between both of these statutes, we conclude that the officer's testimony does not support a violation of either of these statutes. The italicized language above in both of the statutes indicates that these statutes apply only to vehicles driving "outside of a business or residence district." However, in the case before us, there was no evidence presented at the hearing that would establish that Defendant's vehicle was stopped on a highway outside of a business or residential district as those terms are defined in NMSA 1978, Section 66-1-4.2(D) (1993), and NMSA 1978, Section 66-1-4.15(J) (2007). In fact, Officer Olivas testified that Defendant's vehicle was stopped parallel to the other vehicle on a residential street. We thus conclude that the district court did not err in finding that there was no reasonable suspicion based on a violation of either of the two statutory provisions discussed above.

{14} The State argues in the alternative that even if the officer was mistaken as to whether Defendant violated Section 66-3-852, the facts still support reasonable suspicion for the stop on another basis because Defendant "was committing a traffic violation by parking in the middle of the roadway." We are not persuaded. The State relies on our Supreme Court's discussion of mistakes of law in *State v. Hubble*, 2009-NMSC-014, 146 N.M. 70, 206 P.3d 579, in support of its argument. In *Hubble*, our Supreme Court stated that "it is not fatal in terms of reasonable suspicion if an officer makes a mistake of law when he conducts a traffic stop; courts will still look objectively to the totality of the circumstances surrounding the officer's decision to conduct the traffic stop in order to determine if he or she had reasonable suspicion." *Id.* ¶ 28.

{15} In this case, however, the State failed to make the argument below that Defendant's mere act of parking or stopping his car in the middle of the roadway gave rise to objectively reasonable suspicion on the basis that Defendant was violating some other traffic statute. See *State v. Anaya*, 2008-NMCA-020, ¶ 15, 143 N.M. 431, 176 P.3d 1163 (while "conduct premised totally on a mistake of law cannot create the reasonable suspicion needed to make a traffic stop;...if the facts articulated by the officer support reasonable suspicion on another basis, the stop can be upheld"). Instead, the State's argument at the suppression hearing was that it was Defendant's alleged act of obstructing traffic beyond just the stopping of the vehicle that gave rise to reasonable suspicion for the traffic stop. Even after the district court commented from the bench that there were any number of non-criminal reasons for the two vehicles to stop in the middle of the roadway, the State still failed to raise an argument that

stopping alone gave an independent legal basis for the traffic stop. Thus, based on the State's failure to adequately preserve this argument for appellate review, we do not consider this argument any further. See *State v. Lucero*, 1986-NMCA-085, ¶ 11, 104 N.M. 587, 725 P.2d 266 (declining to review an argument by the appellant when the district court "had no opportunity to consider the merits of, or to rule intelligently on" the argument).

2. Crossing Left of the Center of the Roadway

{16} The State also argues that reasonable suspicion existed for the traffic stop based on Officer Olivas' testimony that he observed Defendant cross left of the center of the roadway multiple times. As it contended below, the State argues on appeal that the officer observed a traffic violation under Section 66-7-308. With the exception of four enumerated circumstances that are not applicable in this case, Section 66-7-308(A) specifically provides that "[u]pon all roadways of sufficient width[,] a vehicle shall be driven upon the right half of the roadway, and where practicable, entirely to the right of the center thereof."

{17} Our review of the suppression hearing transcript indicates that Officer Olivas and the passenger in Defendant's vehicle, Miramontes, gave conflicting testimony as to whether Defendant's vehicle crossed left of the center of the roadway. Both witnesses testified that the residential streets Defendant drove on prior to the traffic stop did not have marked lanes of traffic. Officer Olivas testified that he observed Defendant's vehicle cross left of center multiple times although he could not recall the exact streets where this occurred. On the other hand, Miramontes testified that Defendant never crossed left of the center of the roadway while he was being followed by the officer.

{18} We conclude that Miramontes' testimony that Defendant did not drive outside of his lane was sufficient to support the district court's determination that the officer lacked reasonable suspicion to stop Defendant for a violation of Section 66-7-308(A). Although Officer Olivas testified otherwise, it was for the district court, as the fact finder, to resolve any conflicts in the testimony of the witnesses and to determine credibility. See *State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact finder to resolve any conflicts in the testimony of witnesses and to determine where the weight and credibility lay); see also *State v. Affsprung*, 1993-NMCA-056, ¶ 2, 115 N.M. 546, 854 P.2d 873 (stating that when conflicting testimony exists, "it is the trial court's prerogative to determine the credibility of the evidence").

{19} Although the State acknowledges that Miramontes' testimony conflicted with that of the officer, it argues that remand is necessary for entry of specific findings on credibility because the district court failed to enter a finding in its order that the officer's testimony was not credible. In support of this argument, the State relies on *State v. Lovato*, 1991-NMCA-083, 112 N.M. 517, 817 P.2d 251, a case where this Court held that remand was necessary in order for the district court to adopt specific findings of fact relating to the testifying officer's credibility. *Id.* ¶¶ 18-21, 36. Unlike the case before us, however, *Lovato* involved uncontradicted testimony from the officer at the suppression

hearing. *Id.* ¶ 19. On appeal, having determined that the uncontradicted testimony was sufficient to give rise to reasonable suspicion for the traffic stop, *id.* ¶ 14, we held that remand was necessary in order to give the district court an opportunity to enter findings explaining why, despite the officer's testimony, the district court found that there was no reasonable suspicion for the stop. *Id.* ¶¶ 19-20 (stating that remand was necessary "for the trial court to indicate in the record [its] reasons for rejecting uncontradicted testimony" in order to better facilitate appellate review).

{20} Because *Lovato* is distinguishable from this case in that it involved uncontradicted testimony, we disagree with the State that remand is necessary in this case. In addition, we note that although the district court in this case did not include any findings in its order regarding credibility, the court did state in its oral ruling from the bench that it did not find the officer credible on the issue of whether Defendant had crossed left of the center of the roadway. See *Ledbetter v. Webb*, 1985-NMSC-112, ¶¶ 28, 34, 103 N.M. 597, 711 P.2d 874 (stating that a district court's verbal comments can be used to clarify written findings); *State v. Roybal*, 2006-NMCA-043, ¶ 9, 139 N.M. 341, 132 P.3d 598 (same). We conclude that the district court did not err in finding that there was no reasonable suspicion for the stop on the basis of a Section 66-7-308(A) violation and that sufficient evidence supported the district court's ruling.

CONCLUSION

{21} For the foregoing reasons, we affirm the district court's order granting Defendant's motion to suppress.

{22} **IT IS SO ORDERED.**

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge