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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. 29,647

10 **JASON P. CHAVEZ,**

11 Defendant-Appellant.

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

13 **John A. Dean, Jr. , District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

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3 for Appellant

4 **MEMORANDUM OPINION**

5 **WECHSLER, Judge.**

6 Defendant challenges the denial of a motion to suppress. We issued a notice
7 of proposed summary disposition, proposing to uphold the district court's
8 determination. Defendant has filed a memorandum in opposition, which we have duly
9 considered. Because we remain unpersuaded by the assertions of error, we affirm.

10 We briefly reiterate the underlying facts as follows, incorporating additional
11 information supplied in the memorandum in opposition. Deputy Herrera initiated a
12 traffic stop after observing that the registration on Defendant's vehicle had expired.
13 [MIO 4] After observing that Defendant's eyes were bloodshot and watery, Deputy
14 Herrera questioned Defendant about alcohol consumption [MIO 4] and administered
15 an HGN test. [MIO 5] Although Defendant did not display the classic signs of
16 impairment, his pupils failed to react normally to the flashlight. [MIO 5] Deputy
17 Herrera explained that in his experience, this is consistent with the use of narcotics.
18 [MIO 5] He therefore asked Defendant whether he had taken drugs, and Defendant
19 admitted that he had used methamphetamine earlier that day. [MIO 5] At that
20 juncture, Deputy Herrera obtained Defendant's permission to search both his person

1 and the vehicle. [MIO 5] In the course of the search of the vehicle, Deputy Herrera
2 found methamphetamine. [MIO 5; DS 1, 3]

3 Defendant has acknowledged that the initial stop was justified. [RP 51] *See*
4 *State v. Duran*, 2005-NMSC-034, ¶¶ 3, 24, 138 N.M. 414, 120 P.3d 836 (observing
5 that an initial stop was justified when the officer could not determine whether an
6 apparently temporary vehicle registration had expired); *State v. Lowe*,
7 2004-NMCA-054, ¶ 11, 135 N.M. 520, 90 P.3d 539 (observing that an officer
8 lawfully stopped the defendant for an outdated registration tag). However, Defendant
9 disputes the validity of his continuing detention after the issue of the vehicle
10 registration had been addressed. [MIO 2-3]

11 “An officer’s continued detention of an individual, while lawful at the outset,
12 may become unlawful if the officer unjustifiably expands the scope of the detention
13 or, without a valid factual basis, makes inquiries about other criminal activity
14 unrelated to the traffic violation.” *State v. Funderburg*, 2008-NMSC-026, ¶ 14, 144
15 N.M. 37, 183 P.3d 922. Questions about alcohol and drugs are “a separate and
16 distinct line of questioning apart from and outside the scope of the initial justification
17 for the stop,” which must be supported by “a showing of reasonable suspicion” of
18 criminal activity other than that which gave rise to the initial stop. *Duran*,
19 2005-NMSC-034, ¶ 41. Accordingly, if evidence of drugs and alcohol becomes

1 apparent in the course of a traffic stop, giving rise to a reasonable suspicion of drug
2 or alcohol related criminal activity, the officer may expand the scope of the
3 investigation to address those subjects. *See State v. Taylor*, 1999-NMCA-022, ¶ 22,
4 126 N.M. 569, 973 P.2d 246 (filed 1998) (observing that the subjects of drugs and
5 alcohol could come within the scope of an investigation if evidence of drugs and
6 alcohol becomes apparent to the investigating officer); *Funderburg*, 2008-NMSC-026,
7 ¶ 24 (“[R]easonable suspicion can arise out of the evolving circumstances surrounding
8 a traffic stop and may be based upon reasonable inferences drawn from those
9 circumstances.”); *State v. Williamson*, 2000-NMCA-068, ¶ 8, 129 N.M. 387, 9 P.3d
10 70 (“[W]hen an officer investigating a traffic violation has a reasonable and
11 articulable suspicion that the driver is impaired, the officer may detain the driver to
12 investigate the officer’s suspicions.”).

13 As previously mentioned, Deputy Herrera only questioned Defendant about
14 alcohol after observing Defendant’s physical condition. [MIO 4] Deputy Herrera
15 explained that in his experience, Defendant’s bloodshot, watery eyes suggested that
16 he was under the influence of drugs or alcohol. [RP 23]

17 In his memorandum in opposition, we understand Defendant to challenge the
18 sufficiency of the officer’s observations to support the expansion of the inquiry into
19 the subject of alcohol-related impairment. [MIO 8-13] However, we have previously

1 held that officers engaged in traffic stops may expand their investigations into alcohol-
2 related inquiries when presented with similarly suggestive physical evidence. *See*
3 *Williamson*, 2000-NMCA-068, ¶¶ 2, 9 (holding that a traffic stop was validly
4 expanded to incorporate a DWI investigation when the officer detected an odor of
5 alcohol and noticed that the driver had bloodshot, watery eyes). The fact that
6 Defendant’s appearance might have been explained by other factors [MIO 10] does
7 not, in our opinion, render the alcohol-related questioning impermissible. Nor do we
8 find the various out-of-state authorities cited in the memorandum in opposition to be
9 persuasive. [MIO 11-13] Given “the exigency of the possible threat to public safety
10 that a drunk driver poses, [and] New Mexico’s grave concern about the dangers of
11 drunk drivers,” as well as the minimal intrusion of the inquiry, we conclude that
12 Deputy Herrera had a sufficient basis to inquire about alcohol. *See State v. Contreras*,
13 2003-NMCA-129, ¶ 21, 134 N.M. 503, 79 P.3d 1111.

14 To the extent that Defendant takes issue with the administration of the HGN
15 test, we find no indication that Defendant specifically raised this argument in the
16 district court. Nor does Defendant advance any argument on appeal that his
17 compliance with the testing was involuntary. We therefore presume that Defendant
18 voluntarily performed the field sobriety test and reject any challenge that Defendant
19 may be advancing on that basis. *See State v. Harrison*, 2008-NMCA-107, ¶ 14, 144

1 N.M. 651, 190 P.3d 1146 (arriving at a similar conclusion under analogous
2 circumstances), *cert. granted*, 2008-NMCERT-008, 145 N.M. 255, 195 P.3d 1267.

3 Defendant further argues that the alcohol-related inquiry should be regarded as
4 impermissible when evaluated in light of the heightened protections afforded by the
5 New Mexico Constitution. [MIO 13-18] Contrary to Defendant’s assertion, however,
6 [MIO 6, 13] we find no indication that this argument was advanced below. *See State*
7 *v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (describing the
8 preservation requirements associated with claims that the New Mexico Constitution
9 affords greater protection than its federal counterpart). Defendant’s isolated and
10 undeveloped reference to “New Mexico law” [RP 51] is insufficient to preserve an
11 argument of this nature. Moreover, insofar as Defendant has cited no authority that
12 could be regarded as factually on-point and has provided no explanation why the
13 investigative detention should be analyzed differently under the New Mexico
14 Constitution, we are not persuaded that the matter is before us. *See State v. Maez*,
15 2009-NMCA-108, ¶¶ 11-15, 147 N.M. 91, 217 P.3d 104 (arriving at a similar
16 conclusions under analogous circumstances).

17 Next, Defendant argues that the investigation should have come to an
18 immediate conclusion after he satisfactorily performed the HGN test and that the
19 officer’s ensuing questioning about drugs was impermissible. [MIO 18-22] *See*

1 *Duran*, 2005-NMSC-034, ¶ 35 (observing that “all questions asked by police officers
2 during a traffic stop must be analyzed to ensure they are reasonably related to the
3 initial justification . . . or are supported by reasonable suspicion” that may unfold
4 during the investigation or traffic stop). “An officer’s continued detention of a suspect
5 may be reasonable if the detention represents a graduated response to the evolving
6 circumstances of the situation.” *Funderburg*, 2008-NMSC-026, ¶ 16. As previously
7 mentioned, although the HGN test did not reveal the classic signs of impairment,
8 Defendant’s pupils failed to react normally to the flashlight. [MIO 5] Below, Deputy
9 Herrera explained that in his experience, this result is consistent with the use of
10 narcotics. [MIO 5] We conclude that this observation provides an adequate basis for
11 the questions about Defendant’s consumption of drugs. *See id.* ¶ 15 (observing that
12 “reasonable suspicion is a commonsense, nontechnical conception[], which requires
13 that officers articulate a reason, beyond a mere hunch, for their belief that an
14 individual has committed a criminal act” (alteration in original) (internal quotation
15 marks and citation omitted)).

16 In his memorandum in opposition, Defendant contends that Deputy Herrera’s
17 observations about the lack of light-sensitivity of his eyes should not be regarded as
18 a viable basis for inquiring about drugs because the State failed to demonstrate that
19 Deputy Herrera was qualified to render an opinion on this subject. [MIO 20] However,

1 we find no indication that Defendant advanced any argument of this nature below. As
2 a result, we consider it to be unpreserved. *See State v. Sosa*, 2008-NMCA-134, ¶ 26,
3 145 N.M. 68, 193 P.3d 955 (considering a challenge to be unpreserved when no
4 objection was made to the witness’ qualifications to testify about general matters
5 concerning drugs), *rev’d on other grounds by* 2009-NMSC-056, ___ N.M. ___, ___
6 P.3d ___.

7 Defendant also argues that the validity of the continuing detention and drug-
8 related inquiry after the administration of the HGN test should be deemed
9 impermissible in light of heightened protections afforded by the New Mexico
10 Constitution. [MIO 22-23] Once again, however, Defendant’s argument was not
11 preserved below. As a result, we decline to consider it.

12 Next, Defendant argues that his admission that he had consumed drugs some
13 five hours earlier should not be regarded as sufficient grounds for further inquiry or
14 investigation. [MIO 23-24] However, we find no indication that the scope of the
15 investigation was expanded or the length of the detention was extended after
16 Defendant made the admission. Deputy Herrera appears to have simply requested and
17 obtained permission to search. [MIO 5] Nothing further was required to support such
18 a request. *See State v. Bolton*, 111 N.M. 28, 42, 801 P.2d 98, 112 (Ct. App. 1990)
19 (holding that “a momentary extension . . . of a previously lawful detention for the

1 purpose of requesting permission to search is constitutionally permissible”).

2 This brings us to Defendant’s fourth and final argument, by which he contends
3 that his consent was tainted, rendering the searches of his person and vehicle
4 impermissible. [MIO 24-26]

5 As we observed in the notice of proposed summary disposition, Defendant’s
6 consent was untainted if the initial stop and subsequent questioning were permissible.
7 *See Duran*, 2005-NMSC-034, ¶ 42 (holding that consent to search was valid because
8 neither the initial stop nor the ensuing questioning was improper). For the reasons
9 previously stated, we conclude that the initial stop was justified and the subsequent
10 questioning about alcohol and drugs were permissible. As a result, Defendant’s
11 consent was untainted. *See Funderburg*, 2008-NMSC-026, ¶ 25 (“Because the
12 questions about drugs did not impermissibly expand the scope of the stop . . . the
13 driver’s consent to search the vehicle was valid.”). Insofar as Defendant’s consent
14 was not the fruit of an illegality, the motion to suppress was properly denied.

15 For the reasons stated, we affirm.

16 **IT IS SO ORDERED.**

17
18

JAMES J. WECHSLER, Judge

1 **WE CONCUR:**

2 _____
3 **RODERICK T. KENNEDY, Judge**

4 _____
5 **TIMOTHY L. GARCIA, Judge**