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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. 29,388**

10 **MARK ROSE,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

13 **Douglas R. Driggers, District Judge**

14 Gary K. King, Attorney General  
15 Anita Carlson, Assistant Attorney General  
16 Santa Fe, NM

17 for Appellee

18 Robert E. Tangora, L.L.C.  
19 Robert E. Tangora  
20 Santa Fe, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **CASTILLO, Chief Judge.**

1 Mark Rose (Defendant) appeals the denial of his motion to suppress evidence,  
2 pursuant to a conditional guilty plea. The issue on appeal is whether officers had  
3 reasonable suspicion to expand the scope of the traffic stop to inquire about narcotics.  
4 We hold that Defendant's action of making an illegal u-turn and crossing a divided  
5 highway evinced an attempt to evade a narcotics checkpoint and gave rise to  
6 reasonable suspicion to ask Defendant if he was in possession of narcotics. We  
7 therefore affirm the district court's denial of the motion to suppress on this basis. We  
8 do not reach the constitutional questions concerning entrapment or the narcotics  
9 checkpoint because we hold that Defendant failed to preserve these arguments.

## 10 **BACKGROUND**

11 The relevant facts, taken from the testimony at the suppression hearing, are as  
12 follows. Officers Edgar Rosa and Oscar Alvarado of the City of Las Cruces Police  
13 Department and Deputy Gimler of the Doña Ana County Sheriff's Department set up  
14 an operation in which they placed a portable flashing sign that read "narcotics  
15 checkpoint two miles" located 300 yards north of the Hatch exit on Interstate 25.  
16 There was in fact no checkpoint. The officers were positioned to observe cars as they  
17 approached the sign. The officers were looking for drivers who either pulled off the  
18 side of the highway, discarded items, or made a u-turn after seeing the sign. The  
19 officers would then approach the vehicles.

1 Defendant was stopped by Deputy Gimler after he made an illegal u-turn,  
2 crossing Interstate 25 at the checkpoint sign. The deputy asked Defendant for his  
3 license and had him step out of the car. The deputy then asked Defendant whether he  
4 had any drugs in the car, and Defendant responded that he did not. At that point,  
5 Defendant became nervous, and the deputy asked him whether he had any  
6 methamphetamine in his pockets. The deputy testified that he asked about  
7 methamphetamine because Defendant was nervous, fidgeting and moving back and  
8 forth, had a filthy car, and appeared underweight according to his driver's license.  
9 The deputy testified that in his experience this was typical of methamphetamine users.  
10 In response to the question about methamphetamine, Defendant produced a leather  
11 pouch containing several bindles of methamphetamine.

12 Defendant was charged with trafficking by possession with intent to distribute,  
13 contrary to NMSA 1978, Section 30-31-20(A)(3) (2006). Defendant filed a motion  
14 to suppress, arguing that the initial stop and the subsequent questions about drugs  
15 were unconstitutional. At the hearing on the suppression motion, Defendant argued  
16 that the officers lacked reasonable suspicion to stop him because there was no  
17 evidence that his u-turn was illegal and because he had a right to avoid a narcotics  
18 checkpoint, so the u-turn could not be used as a basis to stop him. Defendant also  
19 argued that there was no reasonable suspicion to expand the scope of the stop to ask

1 about methamphetamine.

2       The district court denied the motion to suppress, finding that reasonable  
3 suspicion existed to stop Defendant based on an illegal u-turn and that, once  
4 Defendant was lawfully stopped, the officers developed reasonable suspicion to  
5 expand the scope of the stop to inquire about narcotics. Defendant appeals.  
6 Additional facts are set forth below.

## 7 **DISCUSSION**

### 8 **Standard of Review**

9       “Whether a search and seizure was constitutional is a mixed question of law and  
10 fact. We review factual determinations by the [district] court under a substantial  
11 evidence standard. We review the lower court’s determination of legal questions de  
12 novo.” *State v. Duran*, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836 (citations  
13 omitted).

14       In his brief in chief, Defendant raises three challenges to the district court’s  
15 denial of his motion to suppress. Defendant argues that (1) the ruse narcotics  
16 checkpoint was such outrageous police misconduct that it constituted entrapment, (2)  
17 the checkpoint served an illegal purpose and therefore violated the Fourth  
18 Amendment, and (3) the officers did not have reasonable suspicion to expand the  
19 scope of the stop to inquire about narcotics.

1 The State responds that Defendant did not preserve in district court either his  
2 argument that he was entrapped, or that the ruse checkpoint served an illegal purpose.  
3 Additionally, the State argues that the officers had reasonable suspicion to ask  
4 Defendant about methamphetamine based on his action of evading the narcotics  
5 checkpoint and other observations made by the officers after Defendant was stopped.

6 **Preservation**

7 “To preserve a question for review[,] it must appear that a ruling or decision by  
8 the district court was fairly invoked[.]” Rule 12-216(A) NMRA; *see State v. Lucero*,  
9 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986) (stating that the defendant  
10 must specifically apprise the trial court of the claimed error and invoke an intelligent  
11 ruling thereon in order to preserve the issue for appellate review).

12 On appeal, Defendant states that he was entrapped into making the illegal u-turn  
13 because there were no legal means to avoid the ruse checkpoint. Defendant argues  
14 that the officers’ conduct, in placing notice of the checkpoint in such a way that could  
15 only be avoided by an illegal u-turn, constituted outrageous police conduct.  
16 Defendant thus raises an issue of objective entrapment. *See State v. Vallejos*,  
17 1997-NMSC-040, ¶¶ 14-16, 123 N.M. 739, 945 P.2d 957 (stating that objective  
18 normative entrapment occurs when police conduct exceeds the standards of a proper  
19 investigation and violates substantive due process).

1 Defendant states that he preserved this issue with his arguments at the  
2 suppression hearing. We disagree. Defendant’s arguments at the suppression hearing  
3 were focused on whether reasonable suspicion existed to justify the initial stop and to  
4 expand the scope of the stop to ask about drugs. We note that there was some mention  
5 of entrapment at the hearing. At one point, defense counsel stated:

6 I [would] also point out that this is essentially an entrapment-type  
7 situation . . . citing *Sorrells [v. United States]*, 287 U.S. 435, 451 (1932)  
8 and *Baca v. State*[, 106 N.M. 338, 340-41, 742 P.2d 1043, 1045-46  
9 (1987)] . . . entrapment is maybe not the word I would want to use, but  
10 this is a situation where the police are trying to induce illegal behavior  
11 or at least unusual behavior in the hopes that they could develop  
12 reasonable suspicion on the basis of that.

13 Defense counsel also referred generally to *Baca*, in which our Supreme Court  
14 recognized the defense of objective entrapment. *Id.* Defense counsel did mention the  
15 word “entrapment” but then moved away from it.

16 Defendant did not make any specific argument regarding entrapment, nor did  
17 he develop the facts on which a determination could have been made. *See Vallejos*,  
18 1997-NMSC-040, ¶ 17 (recognizing “two broad categories of [police] impropriety  
19 [that constitute objective entrapment]: unconscionable methods and illegitimate  
20 purposes”). Moreover, Defendant failed to invoke a ruling from the district court on  
21 whether the police conduct exceeded the standards of a proper investigation. *See id.*  
22 ¶ 43 (stating that when a defendant asserts the police either used unconscionable

1 methods, or advanced illegitimate purposes in the course of a police investigation,  
2 then the trial court determines as a matter of law whether the police conduct was  
3 proper); *State v. Martinez*, 2008-NMCA-052, ¶ 10, 143 N.M. 773, 182 P.3d 154  
4 (stating that “[i]n order to preserve an issue for appeal, it must appear that the  
5 appellant fairly invoked a ruling of the trial court on the same grounds argued in the  
6 appellate court” (alteration omitted) (internal quotation marks and citation omitted)).  
7 Before denying the motion, the district court made oral findings and conclusions, all  
8 of which were limited to the issue of reasonable suspicion. No mention was made of  
9 entrapment. Defendant did not ask the district court to rule on the entrapment issue  
10 after the oral ruling, nor did he ask for a determination on this issue any time before  
11 the appeal. We do not address whether the failure to preserve this argument rises to  
12 the level of ineffective assistance of counsel. We therefore hold that Defendant’s  
13 entrapment argument is not preserved.

14 Defendant also argues that the ruse checkpoint did not comport with the  
15 requirements for a legal checkpoint because its primary purpose was to investigate  
16 individuals for narcotics crimes, and all evidence seized as a result must be  
17 suppressed. We do not address the constitutionality of the narcotics checkpoint in this  
18 case because we determine that the issue was not preserved below. Defendant states  
19 that he argued in his motion to suppress that the ruse roadblock did not comport with

1 the requirements for a legal roadblock under *City of Las Cruces v. Betancourt*, 105  
2 N.M. 655, 658-59, 735 P.2d 1161, 1164-65 (Ct. App. 1987), and *City of Indianapolis*  
3 *v. Edmond*, 531 U.S. 32 (2000). However, this was not Defendant’s argument below.  
4 Rather, Defendant cited those cases for the proposition that narcotics checkpoints are  
5 illegal and argued that he had a right to avoid the checkpoint, and his illegal u-turn did  
6 not amount to reasonable suspicion to stop him. *See State v. Salazar*,  
7 2006-NMCA-066, ¶ 9, 139 N.M. 603, 136 P.3d 1013 (stating that “parties cannot  
8 change their arguments on appeal”). Defendant did not ask the district court to  
9 analyze whether the ruse checkpoint comported with the requirements for a legal  
10 checkpoint, nor did the district court make any ruling. *See Betancourt*, 105 N.M. at  
11 658-59, 735 P.2d at 1164-65 (setting out eight factors for the courts to consider in  
12 determining the constitutionality of a checkpoint); *see also Martinez*,  
13 2008-NMCA-052, ¶ 10 (stating that “[i]n order to preserve an issue for appeal, . . . the  
14 appellant [must] invoke[] a ruling of the trial court on the same grounds argued in the  
15 appellate court” (alteration omitted) (internal quotation marks and citation omitted).

16 For these reasons, we hold that Defendant did not preserve these issues, and we  
17 do not address them on appeal. *See State v. Martinez*, 2010-NMCA-051, ¶ 16, 148  
18 N.M. 262, 233 P.3d 791 (stating that “[o]n appeal, the reviewing court will not  
19 consider issues not raised in the lower court unless the issues involve matters of



1 jurisdictional or fundamental error”), *cert. denied*, 2010-NMCERT-005, 148 N.M.  
2 574, 240 P.3d 1048.

### 3 **Reasonable Suspicion to Expand the Stop**

4 Defendant next argues that police did not have reasonable suspicion to expand  
5 the scope of their initial stop to ask him about narcotics. This issue was preserved by  
6 Defendant’s arguments at the suppression hearing and the district court’s ruling that  
7 the officer’s questions about methamphetamine was supported by reasonable  
8 suspicion.

9 “We conduct a *de novo* review of decisions regarding reasonable suspicion.”  
10 *State v. Maez*, 2009-NMCA-108, ¶ 9, 147 N.M. 91, 217 P.3d 104, *cert. denied*, 2009-  
11 NMCERT-008, 147 N.M. 395, 223 P.3d 940. “An officer may expand the scope of  
12 an investigatory stop if the officer has reasonable suspicion that other criminal activity  
13 is taking or has taken place.” *Martinez*, 2010-NMCA-051, ¶ 20; *see State v. Romero*,  
14 2002-NMCA-064, ¶ 10, 132 N.M. 364, 48 P.3d 102 (“If evidence of another crime  
15 surfaces during a routine investigatory stop, the officer may proceed in a reasonable  
16 manner to investigate.”).

17 Defendant argues that officers only articulated generalized statements about his  
18 personal hygiene and the condition of his car. We disagree. The officers initially  
19 observed Defendant cross a divided highway and make an illegal u-turn after seeing

1 a sign warning of a narcotics checkpoint ahead. In *State v. Anaya*, the Supreme Court  
2 held:

3       If a driver is on notice that the checkpoint is ahead, then, where the  
4       driver turns away from the checkpoint and the circumstances lead the  
5       officer reasonably to believe that the driver is attempting to evade the  
6       checkpoint, the officer may form a reasonable suspicion that the driver  
7       is driving while intoxicated.

8 2009-NMSC-043, ¶ 16, 147 N.M. 100, 217 P.3d 586. We think it follows from *Anaya*  
9 that where a driver engages in conduct that indicates he is attempting to evade a  
10 narcotics checkpoint, an officer may form a reasonable suspicion that the driver is in  
11 possession of narcotics. In this case, Deputy Gimler testified that he asked about  
12 narcotics based on Defendant's act of crossing the median of Interstate 25 and making  
13 an illegal u-turn at the point of the checkpoint sign. We believe that this could lead  
14 an officer to reasonably believe that Defendant was trying to avoid the checkpoint. *See*  
15 *id.* ¶ 18 (stating that the officers could reasonably believe that a driver was trying to  
16 evade a DWI checkpoint where she made a u-turn at an intersection in front of a  
17 visible sign announcing the checkpoint and then proceeded in the opposite direction  
18 of travel).

19       Accordingly, we hold that the officers had reasonable suspicion that Defendant  
20 was in possession of narcotics, and the officers did not exceed the scope of the stop  
21 by inquiring about drugs and methamphetamine. *See State v. Williamson*,

1 2000-NMCA-068, ¶ 10, 129 N.M. 387, 9 P.3d 70 (holding that the officer did not  
2 exceed the scope of investigation by inquiring about drugs when the circumstances  
3 justified a reasonable suspicion).

4 **CONCLUSION**

5 For these reasons, we affirm the district court's denial of Defendant's motion  
6 to suppress.

7 **IT IS SO ORDERED.**

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**CELIA FOY CASTILLO, Chief Judge**

10 **WE CONCUR:**

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12 \_\_\_\_\_  
**JAMES J. WECHSLER, Judge**

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14 \_\_\_\_\_  
**LINDA M. VANZI, Judge**