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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 30,580

5 **EDDIE MARTINEZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

8 **Thomas A. Rutledge, District Judge**

9 Gary K. King, Attorney General

10 Margaret E. McLean, Assistant Attorney General

11 Joel Jacobsen, Assistant Attorney General

12 Santa Fe, NM

13 for Appellee

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16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **VANZI, Judge.**

1 Defendant, Eddie Martinez, was convicted pursuant to a conditional plea for
2 possession of controlled substances, possession of drug paraphernalia, and possession
3 of less than one ounce of marijuana. He reserved his right to appeal the district court's
4 denial of his motion to suppress (1) physical evidence obtained in violation of his right
5 to be free from unreasonable searches and seizures, and (2) incriminating statements
6 he made to law enforcement officers while he and the vehicle in which he was a
7 passenger were detained at the secondary area of a sobriety checkpoint. On appeal,
8 Defendant contends that the evidence against him was illegally obtained because law
9 enforcement officers impermissibly extended his detention without reasonable
10 suspicion and questioned him without advising him of his right against self-
11 incrimination. We conclude that during the course of a valid traffic stop of the vehicle
12 in which Defendant was a passenger, law enforcement officers developed reasonable
13 suspicion to lawfully extend the detention of Defendant for investigative purposes and
14 that Defendant was not in custody when he made statements to the law enforcement
15 officers. We affirm.

16 **BACKGROUND**

17 For the background of this case, we rely on the factual findings of the district
18 court and supplement those findings with undisputed evidence from the record. That
19 evidence includes the testimony of the four law enforcement officers who were the

1 only witnesses to testify at the evidentiary hearing on Defendant's motion to suppress
2 and who participated in the detention that Defendant now challenges.

3 At about 10:40 p.m. on May 5, 2009, a truck driven by Maxy Allen approached
4 a sobriety checkpoint between Artesia and Carlsbad. Allen had two male passengers
5 in the truck, her husband or significant other, Paul Tidwell, and Defendant. At the
6 checkpoint, Deputy Ron LeBoeuf made contact with Allen and requested her license,
7 proof of insurance, and registration. Allen provided her driver's license, and Deputy
8 LeBoeuf testified that at that time, he noticed a New Mexico temporary registration
9 sticker in the window behind the driver that appeared to have been altered.

10 Based upon what appeared to be an altered sticker, Deputy LeBoeuf had Allen
11 pull the vehicle into the paved secondary area of the checkpoint on the side of the
12 highway where he again made contact with Allen. Deputy LeBoeuf asked Allen to
13 step out of the vehicle and observed that she was fidgety and seemed very nervous.
14 Her hands were shaking, and she was talking fast. Deputy LeBoeuf testified that
15 because of Allen's actions and the altered temporary sticker, he thought the truck
16 might have been stolen. Deputy LeBoeuf asked Allen who owned the vehicle, and
17 Allen said it belonged to her brother-in-law. Allen had no explanation about the
18 altered temporary sticker and told Deputy LeBoeuf she did not know it had been
19 altered.

1 Deputy LeBoeuf asked Allen to stay at the back of the truck and then went to
2 the cab to talk with Tidwell. Tidwell was seated in the center front seat, and
3 Defendant was seated to his right against the passenger door. Deputy LeBoeuf asked
4 Tidwell who owned the truck, and Tidwell responded that his brother owned it.
5 Deputy LeBoeuf observed that Tidwell had droopy eyes, seemed to be sleepy, and
6 seemed to be under the influence of a depressant such as heroin. Deputy LeBoeuf
7 asked Tidwell, “When was the last time you used [drugs]?” Tidwell responded that
8 he had used drugs a week and a half ago. The district court found Tidwell’s statement
9 was inconsistent with what Deputy LeBoeuf testified he had been observing.

10 Deputy LeBoeuf also asked Tidwell where they were coming from and what
11 they were doing, and Tidwell responded that they had gone to Artesia to pick up
12 Defendant. Deputy LeBoeuf then returned to speak to Allen and asked her where they
13 were coming from and what they had been doing. She said they had taken Defendant
14 to Roswell to meet with his girlfriend.

15 The district court found that at that point Deputy LeBoeuf’s initial investigation
16 into the altered vehicle registration changed and that, as a result, Deputy LeBoeuf
17 asked Tidwell and Defendant to exit the truck to investigate further. Specifically, the
18 district court found that Deputy LeBoeuf had information to suspect drug use and that

1 his observations and contradictory statements from Allen and Tidwell led to that
2 reasonable conclusion.

3 Deputy LeBoeuf asked Tidwell to step to the front of the truck to talk to him
4 more and requested that Deputy Jones remove Defendant from the truck. Deputy
5 Jones testified that once Defendant got out of the truck, Defendant kept putting his
6 hands in and out of his pockets and was acting very “skittish.” Deputy Jones asked
7 Defendant to keep his hands out of his pockets because it created an officer safety
8 issue. The district court agreed and found that Defendant’s behavior created an officer
9 safety issue. In response to Defendant’s actions, Deputy Jones placed Defendant in
10 handcuffs and began to pat him down to determine if he had weapons. Deputy Wall
11 came over, completed the pat down, and located what appeared to be a knife in the
12 pocket of Defendant’s shorts. Deputy Wall asked Defendant if it was a knife, and
13 Defendant said that it was. Deputy Wall removed the knife and stuck to it was a bag
14 containing a green leafy substance that Deputy Wall believed to be marijuana. He
15 then continued the pat down and located what he believed to be two marijuana joints
16 in Defendant’s socks. Deputy Wall informed Defendant that he was going to issue
17 him a citation for possession of a small amount of marijuana, wrote the citation,
18 unhandcuffed Defendant, and told him to go over and stand to the side while other
19 officers continued to investigate.

1 Deputy LeBoeuf testified that, at this point—based on his observation that
2 Tidwell appeared to be under the influence, the information that Defendant had
3 marijuana in his possession, the contradictory statements, and the presence of two
4 backpacks on the floor of the truck—he decided to call for the canine unit from
5 Carlsbad. Deputy LeBoeuf testified that he believed the backpacks, which he
6 described as the kind that kids normally bring to school or you would bring on a day
7 trip, looked full and were inconsistent with the travel plans reported by Allen and
8 Tidwell. According to Deputy LeBoeuf, at the time he decided to call for the canine
9 unit, the truck and its occupants had been stopped for approximately five minutes. He
10 testified that the canine unit arrived about fifteen to twenty minutes later.

11 When Corporal David Whitzel and his canine partner arrived, Corporal Whitzel
12 provided Deputy LeBoeuf with a consent to search form. Deputy LeBoeuf
13 approached Allen with the form, and she gave consent to search the vehicle. Corporal
14 Whitzel and his canine then searched the vehicle. In the course of the search, the dog
15 aggressively alerted by scratching and biting at a red backpack. Deputy Jones
16 removed the backpack and took it to the tailgate of the pick-up truck. One of the
17 officers asked whose backpack it was, and Defendant said it was his and that it
18 contained dirty needles.

1 Defendant was not in handcuffs at the time his backpack was searched, and he
2 made no efforts to leave. The officers searched the backpack and found what
3 appeared to be illegal drugs and paraphernalia. Defendant identified the items.
4 Defendant did not challenge the actual search of the bag. The district court found that
5 during the course of the search, Defendant was not in custody because Defendant was
6 no longer in handcuffs, and he had already been issued a non-traffic citation.
7 Defendant was arrested and ultimately charged with possession of controlled
8 substances, possession of drug paraphernalia, and possession of less than one ounce
9 of marijuana.

10 After the search of Defendant's backpack was complete, Deputy LeBoeuf took
11 the registration sticker out, examined it, ran the vehicle identification number, and
12 learned the vehicle was not listed as stolen. Allen and Tidwell were released with the
13 vehicle. Deputy LeBoeuf testified that the entire stop took approximately forty-five
14 minutes.

15 Defendant moved to suppress on two grounds: (1) that his detention and
16 questioning by law enforcement officers exceeded the permissible scope of the inquiry
17 into the initial stop under both federal and state law; and, (2) that his statements to the
18 officers were obtained in violation of his right against self-incrimination. After an
19 evidentiary hearing, the district court denied the motion and concluded that the initial

1 stop was valid and that in the course of the stop, the officer observed and received
2 information that led to pursuing other matters such as drug possession. Defendant was
3 subsequently convicted pursuant to a conditional guilty plea and reserved his right to
4 appeal the denial of his motion to suppress. He was sentenced and incarcerated. The
5 district court entered a judgment and order and set bond pending appeal. This appeal
6 timely followed.

7 **DISCUSSION**

8 **Defendant Was Not Illegally Detained**

9 Defendant first argues that his prolonged detention at the secondary area of the
10 sobriety checkpoint exceeded the permissible scope of inquiry for an altered
11 temporary registration sticker and that, therefore, the fruits of the detention and
12 subsequent search of him and the backpack must be suppressed. Defendant does not
13 challenge the validity of the checkpoint, the legality of the initial stop, or Deputy
14 LeBoeuf's direction of the truck into the secondary area. Accordingly, we understand
15 Defendant's argument to be that the detention was impermissibly expanded at the
16 secondary area of the checkpoint when Tidwell was questioned about drug use and
17 then both Tidwell and Defendant were ordered out of the truck for further questioning.
18 Defendant contends that Deputy LeBoeuf should have continued to pursue the steps
19 necessary to investigate the altered temporary sticker and to gather the necessary

1 information to confirm or dispel his suspicion that the truck may have been stolen.
2 Defendant asserts that by questioning Allen and Tidwell about their travel plans and
3 asking Tidwell about his drug use, Deputy LeBoeuf abandoned his investigation into
4 the altered temporary sticker and immediately “launch[ed] a drug trafficking
5 investigation.” Defendant contends that these interactions impermissibly expanded
6 the lawful detention of the vehicle and its passengers, leading to his removal from the
7 truck and the subsequent pat down and search of his backpack. As a preliminary
8 matter, we note that contrary to the State’s assertions, even though Defendant was
9 only a passenger in the truck, he may properly contest the lawfulness of his detention
10 and seek to suppress evidence found as a result of that detention. *See State v. Portillo*,
11 2011-NMCA-079, ¶ 11, 150 N.M. 187, 258 P.3d 466 (observing that a defendant who
12 was a passenger in a vehicle stopped by law enforcement had standing to challenge
13 his detention, and to the extent that the defendant was illegally detained, he had
14 standing to seek the suppression of any evidence obtained as a result of that
15 detention), *cert. denied*, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633. With this
16 framework in mind, we review the district court’s denial of Defendant’s motion to
17 suppress. We begin with the appropriate standard of review.

18 Appellate review of a motion to suppress presents a mixed question of fact and
19 law. *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861. We review

1 the district court’s factual determinations under the substantial evidence standard,
2 viewing the facts in a light favorable to the prevailing party. *State v. Ketelson*, 2011-
3 NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957. We review the application of the law
4 to the facts de novo. *Id.*

5 “It is well established that the initiation of a traffic stop constitutes a seizure of
6 the vehicle’s occupants.” *Portillo*, 2011-NMCA-079, ¶ 12. However, “[a]n officer’s
7 continued detention of an individual, while lawful at the outset, may become unlawful
8 if the officer unjustifiably expands the scope of the detention.” *State v. Funderburg*,
9 2008-NMSC-026, ¶ 14, 144 N.M. 37, 183 P.3d 922. “Continued detention of a driver,
10 or detention of passengers, for other investigative purposes, including investigatory
11 questioning, requires reasonable suspicion, proven through specific articulable facts,
12 that the driver or passenger has been or is engaged in a criminal activity other than the
13 initial traffic violation.” *State v. Affsprung*, 2004-NMCA-038, ¶ 11, 135 N.M. 306,
14 87 P.3d 1088; *see Leyva*, 2011-NMSC-009, ¶ 10 (“The scope of the investigation may
15 be expanded where the officer has reasonable and articulable suspicion that other
16 criminal activity has been or may be afoot.” (internal quotation marks and citation
17 omitted)). Accordingly, in this case, we must determine whether Deputy LeBoeuf had
18 reasonable suspicion to detain Allen, Tidwell, and Defendant to investigate anything
19 more than the altered temporary registration sticker.

1 At the outset, we note that Defendant moved to suppress the fruits of the
2 searches of himself and his backpack under both the Fourth Amendment of the
3 Federal Constitution and Article II, Section 10 of the New Mexico Constitution.
4 Thus, we apply our interstitial approach, first analyzing whether Defendant’s rights
5 were protected under the Fourth Amendment and, if not, then determining whether
6 Article II, Section 10 provides greater protections against unreasonable searches and
7 seizures in this case. *Ketelson*, 2011-NMSC-023, ¶ 10; *see Leyva*, 2011-NMSC-009,
8 ¶ 55 (noting that an officer’s actions in the course of a valid traffic stop will be
9 scrutinized differently under the Federal and New Mexico Constitutions, and
10 explaining our analysis under Article II, Section 10, which provides greater
11 protections than the Fourth Amendment).

12 **1. No Fourth Amendment Violation**

13 “The Fourth Amendment guarantees the right of the people to be free from
14 unreasonable searches and seizures.” *Leyva*, 2011-NMSC-009, ¶ 8. The focus of our
15 inquiry under the Fourth Amendment in this case is whether, after making a valid
16 stop, the officer’s subsequent actions measurably extended the detention beyond the
17 time needed to investigate the circumstances that initially justified the stop. *Id.* ¶¶ 19,
18 21. “Whether a detention becomes unreasonably prolonged depends on whether the
19 police diligently pursued a means of investigation that was likely to confirm or dispel

1 their suspicions quickly, during which time it was necessary to detain the defendant.”
2 *Id.* ¶ 19 (internal quotation marks and citation omitted). An officer’s actions
3 subsequent to a valid stop are not reasonably related in scope to the circumstances that
4 caused the initial stop if he or she detains the occupants of a vehicle beyond the time
5 needed to investigate the reason for the stop, unless he or she developed reasonable
6 suspicion of other criminal activity. *Id.*

7 In our Fourth Amendment analysis, we do not examine the content of
8 questioning by law enforcement. *Id.* ¶ 17. However, we will find a violation of the
9 Fourth Amendment when a detention is extended beyond the time reasonably needed
10 to complete the underlying justification of the stop due to questioning that is unrelated
11 to the initial stop and unsupported by reasonable suspicion. *Id.* ¶¶ 22-23. With these
12 principles in mind, when determining whether an officer’s conduct was diligent in the
13 context of the Fourth Amendment, we assess whether the totality of the circumstances
14 of the entire detention indicate that the duration of the detention was reasonable. *Id.*
15 ¶ 22.

16 Defendant appears to make four arguments in support of his assertion that the
17 length of his detention—approximately five minutes—was unreasonable under the
18 Fourth Amendment. First, he contends that Deputy LeBoeuf’s initial questioning of
19 Allen and Tidwell impermissibly extended his detention. Second, he argues that his

1 detention was impermissibly extended because Deputy LeBoeuf should have
2 immediately determined whether or not the truck was stolen rather than inquire about
3 Allen and Tidwell's travel plans. Third, he argues that Deputy LeBoeuf violated his
4 Fourth Amendment rights by conducting a pretextual drug investigation instead of
5 investigating the altered temporary sticker. Finally, Defendant appears to assert that
6 Deputy LeBoeuf's investigation into whether a drug crime was being committed and
7 ordering Defendant out of the vehicle with Tidwell, resulting in an unlawful
8 expansion of the original stop. We take each of these arguments in turn.

9 To the extent Defendant argues that Deputy LeBoeuf's questioning of Allen and
10 Tidwell impermissibly extended his detention and expanded the scope of the stop
11 because Deputy LeBoeuf lacked reasonable suspicion to investigate anything other
12 than whether the temporary sticker was altered, we disagree. Deputy LeBoeuf
13 testified that at the time he made contact with Allen at the secondary area of the
14 checkpoint and requested she exit the vehicle to speak with him, he suspected that the
15 truck might have been stolen. Deputy LeBoeuf testified that he based this suspicion
16 on the altered temporary sticker, Allen's fidgety and very nervous behavior, and the
17 lack of proof of ownership of the vehicle. Under the circumstances of this case, we
18 conclude that at the point Deputy LeBoeuf made contact with Allen, he had reasonable
19 suspicion to investigate whether the truck in which Defendant was a passenger may

1 have been stolen. *See Leyva*, 2011-NMSC-009, ¶ 23 (“Reasonable suspicion must
2 consist of more than an officer’s hunch that something is amiss; it requires objectively
3 reasonable indications of criminal activity.”); *see, e.g., State v. Van Dang*, 2005-
4 NMSC-033, ¶ 15, 138 N.M. 408, 120 P.3d 830 (concluding that it was reasonable for
5 an officer to investigate whether a rental car, which he initially stopped for speeding,
6 was stolen when the driver’s name did not appear on the rental contract). Because
7 Deputy LeBoeuf had developed reasonable suspicion to believe the truck may have
8 been stolen, we measure the reasonableness of the length of the detention, not by the
9 time needed to determine whether the temporary sticker had been altered, but by the
10 time required to diligently investigate whether the truck was actually stolen. *See*
11 *Leyva*, 2011-NMSC-009, ¶¶ 18-19 (explaining that the length of a stop is limited by
12 the time required to investigate the initial justification of the stop unless the officer
13 develops reasonable suspicion of additional criminal activity). Defendant does not
14 argue that the actual length of time at this initial stage of the investigation was
15 unreasonable, and we conclude that it was not.

16 To the extent Defendant contends that his detention was impermissibly
17 extended when LeBoeuf questioned Allen and Tidwell about their travel plans instead
18 of immediately determining whether or not the truck was stolen, we also disagree.
19 Our review of the record and the findings by the district court establish that Deputy

1 LeBoeuf's questions to Allen and Tidwell about their travel plans were made within
2 the first several minutes of the stop in the secondary area and were part of his
3 investigation into whether the truck was stolen. *See Van Dang*, 2005-NMSC-033, ¶
4 15 (stating that where an officer had reasonable suspicion to believe a vehicle may be
5 stolen, the officer's questioning of the driver and the passenger about their travel plans
6 was a reasonable step in that investigation). We conclude that these questions were
7 part of Deputy LeBoeuf's diligent investigation into whether the truck was stolen and
8 were aimed to quickly confirm or dispel his suspicion; accordingly, his questioning
9 did not measurably extend Defendant's detention at the secondary area of the
10 checkpoint. *See id.* ¶ 5 (holding that the twenty-five minute detention of a vehicle and
11 its occupants was reasonable under the circumstances where the officer was
12 investigating what appeared to be the driver's unauthorized use of a rental vehicle).

13 To the extent Defendant asserts that Deputy LeBoeuf prolonged his detention
14 and thereby violated his Fourth Amendment rights by "launch[ing] a drug trafficking
15 investigation" instead of investigating the altered temporary sticker, we conclude this
16 assertion is not supported by the record. It appears that Defendant bases this
17 contention on the one question LeBoeuf asked Tidwell regarding when he last used
18 drugs. We do not scrutinize the subject matter of an officer's questioning in our
19 Fourth Amendment analysis. *Leyva*, 2011-NMSC-009, ¶ 18. Therefore, we must only

1 determine whether this one question measurably extended the duration of the stop.
2 *See id.* ¶¶ 21, 55; *Portillo*, 2011-NMCA-079, ¶¶ 19, 21. We conclude that Deputy
3 LeBoeuf’s one question to Tidwell about whether he was under the influence of
4 narcotics—asked in the course of the investigation into whether the vehicle was
5 stolen—did not appreciably extend the length of the stop as a whole. *See Portillo*,
6 2011-NMCA-079, ¶¶ 5, 21 (holding that an officer’s questioning about narcotics and
7 weapons did not appreciably extend a valid traffic stop when the officer did not have
8 reasonable suspicion regarding contraband and asked the questions after issuing a
9 citation).

10 Defendant also appears to argue that if Deputy LeBoeuf’s investigation into
11 whether truck was stolen was valid, it nevertheless ripened into an unlawful detention
12 when Deputy LeBoeuf continued to detain the driver and her passengers to investigate
13 whether a drug crime was being committed and when he ordered Defendant out of the
14 vehicle. Under the facts presented, we disagree. During Deputy LeBoeuf’s brief
15 contact with Tidwell, he observed that Tidwell appeared to be under the influence of
16 a depressant such as heroin. Deputy LeBoeuf testified that he had training and
17 experience in identifying people under the influence of heroin. Although Tidwell
18 denied being under the influence at that time, he admitted to having used a week and
19 a half earlier. Deputy LeBoeuf testified that this statement was inconsistent with his

1 observations, and the district court agreed. We also conclude that based on his
2 observations, knowledge, and training, Deputy LeBoeuf had developed reasonable
3 suspicion to believe a drug crime may have been occurring and to extend the detention
4 to investigate. *See Leyva*, 2011-NMSC-009, ¶ 23 (“Courts defer to the training and
5 experience of the officer when determining whether particularized and objective
6 indicia of criminal activity existed.” (internal quotation marks and citation omitted)).
7 Under the totality of the circumstances that became known to Deputy LeBoeuf at the
8 secondary area of the checkpoint, we conclude that he diligently conducted his
9 investigation into whether the truck was stolen, and in the course of that investigation,
10 developed reasonable suspicion to investigate whether a drug crime was occurring.
11 The short period of five or so minutes from the time the vehicle was ordered to the
12 secondary area until the time Defendant exited the vehicle was reasonable under the
13 Fourth Amendment. *See id.* ¶ 22 (“To determine whether questioning creates an
14 unreasonable detention, the pertinent inquiry is whether the officer conducted the
15 investigation *diligently*.”). We determine that Defendant was not detained for a
16 prolonged length of time in violation of Fourth Amendment rights and now turn to
17 whether he is afforded any additional protection under the New Mexico Constitution.

18 **2. No Article II, Section 10 Violation**

1 The key inquiry under both the Fourth Amendment and Article II, Section 10
2 is whether the government’s intrusion upon an individual’s liberty was reasonable.
3 *Leyva*, 2011-NMSC-009, ¶ 22; *Ketelson*, 2011-NMSC-023, ¶ 20. The overall
4 reasonableness of a search or seizure “depends on the balance between the public
5 interest and the individual’s interest in freedom from police intrusion upon personal
6 liberty.” *Ketelson*, 2011-NMSC-023, ¶ 20. In *Leyva*, our Supreme Court articulated
7 the standard to determine whether a detention by law enforcement during a traffic stop
8 was constitutionally reasonable:

9 Article II, Section 10 requires that all questions asked during the
10 investigation of a traffic stop be reasonably related to the initial reason
11 for the stop. Unrelated questions are permissible when supported by
12 independent reasonable suspicion, for reasons of officer safety, or if the
13 interaction has developed into a consensual encounter.

14 *Leyva*, 2011-NMSC-009, ¶ 55. We recognize that “an officer does not have to ignore
15 new information that becomes known to him after the initial stop[,]” and we consider
16 “the circumstances originally warranting the stop, informed by what occurred, and
17 what the officer learned, as the stop progressed.” *State v. Sewell*, 2009-NMSC-033,
18 ¶ 19, 146 N.M. 428, 211 P.3d 885 (internal quotation marks and citation omitted).
19 When determining whether an officer had reasonable suspicion to expand the scope
20 of a stop, we “must necessarily take into account the evolving circumstances with
21 which the officer was faced” and find the detention reasonable if it “represents a

1 graduated response to the evolving circumstances of the situation.” *Funderburg*,
2 2008-NMSC-026, ¶ 16 (alteration, internal quotation marks, and citation omitted). In
3 this context, Article II, Section 10’s requirement that an officer’s questions must be
4 reasonably related to the initial stop, or based on reasonable suspicion, “ensures that
5 investigating officers do not engage in ‘fishing expeditions’ during traffic stops.”
6 *Leyva*, 2011-NMSC-009, ¶ 55.

7 Defendant concedes that there was reasonable justification for Deputy LeBoeuf
8 to refer Allen to the secondary checkpoint to investigate whether the temporary
9 registration sticker was altered. However, Defendant contends that Deputy LeBoeuf
10 had no independent reasonable suspicion that a drug crime was being committed and,
11 as a result, the expansion of the detention to question him about drugs was unlawful
12 under Article II, Section 10. *See Funderburg*, 2008-NMSC-026, ¶ 24 (stating that
13 “questions about drugs . . . are a separate and distinct line of questioning apart from
14 and outside the scope of the initial justification for the stop, and must be supported by
15 a showing of reasonable suspicion” (internal quotation marks and citation omitted));
16 *see also Portillo*, 2011-NMCA-079, ¶¶ 23-24 (holding that a defendant-passenger was
17 subjected to illegal detention where an officer’s conduct impermissibly expanded the
18 scope of the detention when, after stopping a vehicle for speeding, the officer
19 questioned the driver and passenger about weapons and narcotics without reasonable

1 suspicion). For the reasons that follow, we conclude that Deputy LeBoeuf had such
2 independent reasonable suspicion.

3 Our analysis of whether reasonable suspicion existed for an officer to expand
4 the scope of a detention to include questions about drugs is informed by whether a
5 particular officer’s training and experience “enhanced his ability to derive and
6 articulate particularized and objective indicia of criminal activity.” *Van Dang*, 2005-
7 NMSC-033, ¶ 16; *see Leyva*, 2011-NMSC-009, ¶ 60 (noting that the district court
8 appropriately gave weight to officer training and experience in its determination that
9 the officer had reasonable suspicion to ask about weapons). Here, as we noted above,
10 Deputy LeBoeuf testified that he had training and experience in recognizing the
11 effects of illegal depressants, including heroin. Based on Deputy LeBoeuf’s training
12 and experience and his specific observations that Tidwell appeared to be under the
13 influence of a depressant such as heroin, we cannot say that the district court erred in
14 finding that Deputy LeBoeuf had reasonable suspicion to ask Tidwell about his drug
15 use. *See State v. Candelaria*, 2011-NMCA-001, ¶ 21, 149 N.M. 125, 245 P.3d 69
16 (holding that an officer was justified in asking a defendant whether he had been
17 smoking when the officer smelled marijuana in the vehicle), *cert. denied*, 2010-
18 NMCERT-011, 150 N.M. 490, 262 P.3d 1143. Additionally, we conclude this one
19 question, which expanded the stop, but did not in itself appreciably extend the

1 detention, was a minimal intrusion when balanced against the public’s interest in
2 preventing drug use. *See Funderburg*, 2008-NMSC-026, ¶ 27 (stating that an officer
3 may “ask minimally intrusive questions to confirm or dispel” reasonable suspicion
4 “arising from the traffic stop, as long as the questions are reasonable and intrude on
5 a person’s liberty as little as possible under the circumstances” (internal quotation
6 marks and citation omitted)). To the extent Deputy LeBoeuf’s question to Tidwell
7 about his drug use expanded and extended the duration and scope of the detention as
8 to Defendant, we conclude the detention was reasonable under the circumstances and
9 represented a graduated response to the evolving situation. *See State v. Duran*, 2005-
10 NMSC-034, ¶¶ 38, 42, 138 N.M. 414, 120 P.3d 836 (concluding that an officer
11 permissibly expanded the scope of the stop after developing reasonable suspicion
12 based on the officer’s observations during the stop as well as the driver’s responses
13 to the officer’s questions), *overruled on other grounds by Leyva*, 2011-NMSC-009.

14 Defendant asserts that his removal from the truck violated his constitutional
15 rights either because Deputy LeBoeuf lacked reasonable suspicion that Defendant
16 himself was involved in criminal activity or because his removal impermissibly
17 extended his detention. Defendant does not develop this argument or provide
18 supporting authority; accordingly, we do not consider the issue here. *See In re*
19 *Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (holding that an

1 appellate court will not consider an issue if no authority is cited in support of the
2 issue). Nevertheless, having held that Deputy LeBoeuf had reasonable suspicion to
3 investigate whether the truck was stolen and to suspect that Tidwell was under the
4 influence of heroin, Deputy LeBoeuf was still conducting his investigation at the time
5 he asked Defendant to exit the vehicle. Whether Defendant was in the cab of the truck
6 or outside did not unduly extend or expand the length of the detention.

7 Defendant relies on *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206 P.3d
8 143, to argue that Deputy LeBoeuf’s extended detention of Defendant was
9 impermissible because the basis for the detention was a “pretextual drug
10 investigation.” Defendant contends that *Ochoa*’s reasoning should apply here,
11 asserting that Deputy LeBoeuf exceeded his authority by detaining Defendant on an
12 unsupported hunch of drug trafficking. In *Ochoa*, we held that a traffic stop is
13 pretextual, and thus violates Article II, Section 10, if the real purpose of the stop is
14 unsupported by reasonable suspicion or probable cause, or if the officer would not
15 otherwise have stopped the vehicle. *Ochoa*, 2009-NMCA-002, ¶ 40; *see also State*
16 *v. Gonzales*, 2011-NMSC-012, ¶ 3, 150 N.M. 74, 257 P.3d 894 (interpreting *Ochoa*
17 “to require a determination whether the real reason for the stop is supported by
18 objective evidence of reasonable suspicion”). Here, however, the parties agree that

1 the initial stop and the initial detention at the secondary area of the checkpoint were
2 justified. *Ochoa* and *Gonzales* are therefore not applicable in this context.

3 The district court found that at the time Deputy LeBoeuf had Tidwell and
4 Defendant exit the truck, the officer's observations and the information he had
5 received from the occupants of the truck led him to reasonably expand his inquiry to
6 investigate his suspicion regarding drug use. In light of the totality of the
7 circumstances known at the time Defendant got out of the truck, we affirm the district
8 court and conclude that the officer's suspicions about whether the vehicle was stolen
9 and whether a drug crime was occurring were based on specific articulable facts that
10 Deputy LeBoeuf learned over the course of the five minute stop. Defendant's
11 detention at the point he exited the vehicle was constitutionally sound under Article
12 II, Section 10.

13 After Defendant exited the vehicle, he was subjected to a pat down for officer
14 safety. In the course of the pat down, Deputy Wall discovered what, in his training
15 and experience, he believed to be marijuana. Defendant does not challenge the
16 legality of the pat down but argues that the district court should have suppressed the
17 evidence of marijuana because it was the fruit of what at that time was an illegal
18 detention. Having held the detention of Defendant was not unduly prolonged and was
19 reasonable, we conclude that the district court did not err in denying Defendant's

1 motion to suppress the fruits of the detention and subsequent search of Defendant and
2 his backpack.

3 It is uncontested that at the point Deputy LeBoeuf learned Defendant had
4 marijuana on his person, he developed additional reasonable suspicion to expand the
5 scope of the stop to investigate whether the vehicle contained evidence of illegal drug
6 activity. *See Funderburg*, 2008-NMSC-026, ¶ 28 (concluding that the officer had
7 reasonable suspicion that evidence of a drug crime might be found in the vehicle when
8 the officer had actual knowledge of drug activity by another occupant of the vehicle).
9 Defendant asserts that after the handcuffs were removed and he was cited for the
10 marijuana, he was told to stand at the scene and, therefore, was in custody during the
11 pendency of the drug investigation. We now examine whether Defendant was in
12 custody and whether he should have been given *Miranda* warnings.

13 **Defendant Was Not In Custody**

14 Defendant argues that the district court erred when it found Defendant was not
15 in custody at the time the canine unit searched the car and law enforcement
16 subsequently questioned Defendant. Defendant contends that he was in custody for
17 the purposes of *Miranda* and that law enforcement should have advised him of his
18 rights against self-incrimination before questioning him about the red backpack and
19 its contents. Again, we begin with the standard of review.

1 *Miranda* warnings are required to protect a suspect’s Fifth Amendment rights
2 against self-incrimination when an individual is “subjected to the inherently
3 compelling pressures of custodial police interrogations.” *State v. Olivas*, 2011-
4 NMCA-030, ¶ 10, 149 N.M. 498, 252 P.3d 722, *cert. denied*, 2011-NMCERT-003,
5 150 N.M. 619, 264 P.3d 520. “An officer’s obligation to administer *Miranda*
6 warnings arises only when a person is (1) interrogated while (2) in custody.” *State v.*
7 *Wilson*, 2011-NMSC-001, ¶ 48, 149 N.M. 273, 248 P.3d 315 (alteration, internal
8 quotation marks, and citation omitted). “Whether a defendant was subject to a
9 custodial interrogation . . . [is a] legal determination[] that we review de novo.”
10 *Olivas*, 2011-NMCA-030, ¶ 8. In reviewing the district court’s ruling on Defendant’s
11 motion to suppress, we apply the substantial evidence standard to the factual findings
12 and view the facts in the light most favorable to the prevailing party. *Id.* “[W]e
13 indulge in all reasonable inferences in support of the district court’s ruling and
14 disregard all evidence and inferences to the contrary.” *Id.* (internal quotation marks
15 and citation omitted). Here, it is uncontested that the officers asked Defendant
16 questions that they knew were likely to elicit incriminating responses regarding drug
17 use and possession; therefore, the sole issue we consider is whether Defendant was in
18 custody when questioned.

1 “Custody is defined as either (1) formal arrest, or (2) a restraint on freedom of
2 movement of the degree associated with a formal arrest.” *State v. McNeal*, 2008-
3 NMCA-004, ¶ 10, 143 N.M. 239, 175 P.3d 333 (internal quotation marks and citation
4 omitted); *Olivas*, 2011-NMCA-030, ¶ 10. The test to determine whether an individual
5 was in custody is an objective one, and the only relevant inquiry is how a reasonable
6 person in the individual’s position would have understood his or her situation. *Olivas*,
7 2011-NMCA-030, ¶ 14. Not all detentions by law enforcement officers rise to the
8 level of custody, and the questioning of an individual during an investigatory
9 detention that is supported by an officer’s reasonable suspicion is generally not
10 considered a custodial interrogation subject to *Miranda*. *State v. Smile*, 2009-NMCA-
11 064, ¶ 26, 146 N.M. 525, 212 P.3d 413, *cert. quashed*, 2010-NMCERT-006, 148 N.M.
12 584, 241 P.3d 182; *see Armijo v. State ex rel. Transp. Dep’t*, 105 N.M. 771, 773-74,
13 737 P.2d 552, 554-55 (Ct. App. 1987) (“The roadside questioning of a motorist
14 pursuant to a routine traffic stop does not constitute custodial interrogation.”), *but see*
15 *Olivas*, 2011-NMCA-030, ¶¶ 12, 14-15 (holding that the defendant was in *Miranda*
16 custody when he was handcuffed and transported to the district attorney’s office,
17 interrogated, never told he was not under arrest or free to terminate the interview, and
18 his movements were restricted by officers because he was not allowed to leave the
19 interrogation room without police escort); *State v. Wilson*, 2007-NMCA-111, ¶ 19,

1 142 N.M. 737, 169 P.3d 1184 (noting that, in some situations, such as when an officer
2 uses handcuffs, puts the suspect in a police vehicle, or uses force, an investigatory
3 detention can become the equivalent of custody such that the *Miranda* warnings are
4 required). Unlike custodial interrogations, “investigatory detentions, such as traffic
5 stops, do not implicate the Fifth Amendment . . . since investigatory detentions are
6 generally public, temporary, and substantially less coercive than custodial
7 interrogations[.]” *State v. Snell*, 2007-NMCA-113, ¶ 12, 142 N.M. 452, 166 P.3d
8 1106 (internal quotation marks and citation omitted). Moreover, the fact that an
9 officer has focused his investigation on a particular suspect at the time of questioning
10 does not necessitate *Miranda* warnings. *State v. Swise*, 100 N.M. 256, 258, 669 P.2d
11 732, 734 (1983).

12 In a case such as this, where no formal arrest occurred prior to questioning by
13 law enforcement, we “engage in a fact-specific analysis of the totality of the
14 circumstances under which the questioning took place in order to decide whether the
15 custody requirement is met.” *Olivas*, 2011-NMCA-030, ¶ 10. Our Supreme Court has
16 identified factors to guide our inquiry, including “the purpose, place, and length of
17 interrogation, the extent to which the defendant [was] confronted with evidence of
18 guilt, the physical surroundings of the interrogation, the duration of the detention, and

1 the degree of pressure applied to the defendant.” *Id.* (alteration, internal quotation
2 marks, and citation omitted); *Wilson*, 2011-NMSC-001, ¶ 48.

3 Defendant asserts that he was in custody at the time he was asked who the red
4 backpack belonged to and during the subsequent search of the backpack. Defendant
5 argues that he was in custody based on the following facts: he was detained at the
6 secondary checkpoint, late at night, after having been handcuffed, cited for possession
7 of marijuana, released from handcuffs, and told to stand to the side while the
8 investigation into the vehicle continued, and he was never told he was free to leave.
9 Defendant contends that this was the sort of “coercive atmosphere against which
10 *Miranda* was developed to protect.” *Swise*, 100 N.M. at 258, 669 P.2d at 734. The
11 State responds that Defendant was not in custody and that after he was released from
12 the handcuffs, he was just standing around watching the events unfold until the canine
13 unit arrived, and the dog alerted to the red backpack. The State also argues that
14 Defendant was not in custody after the dog alerted to the red backpack because the
15 officers did not take any action with regard to Defendant that would make a
16 reasonable person believe he was under arrest.

17 Defendant directs us to *State v. Munoz*, 1998-NMSC-048, 126 N.M. 535, 972
18 P.2d 847, *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442, and *Olivas*,
19 2011-NMCA-030, as determinative of whether he was in custody. In each of these

1 cases, the defendants challenged a ruling that they were not in custody for *Miranda*
2 purposes at the time they made incriminating statements to the police. However, in
3 each case, the defendants came into contact with the police after law enforcement
4 sought them out for questioning, and the lower courts' determination of whether the
5 defendants were subject to custodial interrogation took into consideration the
6 defendants' willingness to leave their homes and meet with law enforcement either in
7 a police vehicle or office. *See Nieto*, 2000-NMSC-031, ¶ 21 (holding that the
8 defendant was not in custody when the defendant was asked and agreed to accompany
9 officers to the station for questioning and was free to leave or terminate the interview);
10 *Munoz*, 1998-NMSC-048, ¶¶ 3, 5, 44 (holding that the defendant was not in custody
11 when FBI agents went to the defendant's home to speak with him and before the
12 defendant got into the agents' car, they explained he did not have to go with them and
13 that he was not under arrest and he was not restrained), *but see Olivas*, 2011-NMCA-
14 030, ¶¶ 11, 16 (holding that the defendant was in custody when he agreed to go to the
15 district attorney's office for questioning but was handcuffed and transported in a
16 police vehicle and escorted by officers at all times).

17 Here, in contrast, Defendant's contact with law enforcement arose from a valid
18 traffic stop at the sobriety checkpoint that evolved into a lawful detention to
19 investigate Deputy LeBoeuf's reasonable suspicion that the truck was stolen and that

1 the truck may contain evidence of illegal drugs. Because Defendant’s presence at the
2 secondary area was not voluntary, the applicability of the cases cited by Defendant is
3 limited here. We consider a *Miranda* case arising out of roadside investigatory
4 detention to assist us in determining whether the initial investigatory detention to
5 which Defendant was subject ripened into a custodial interrogation.

6 In *Snell*, this Court explained the difference between a traffic stop and a
7 custodial interrogation. 2007-NMCA-113, ¶ 13. In that case, we said that “if a
8 motorist who has been detained pursuant to a traffic stop thereafter is subjected to
9 treatment that renders him in custody for practical purposes, he will be entitled to the
10 full panoply of protections prescribed by *Miranda*.” *Snell*, 2007-NMCA-113, ¶ 14
11 (internal quotation marks and citation omitted). We reasoned that the conduct of the
12 police exerted the sort of coercive pressure that sufficiently impaired the driver’s free
13 exercise of his privilege against self-incrimination where the police threatened him
14 with arrest, physically escorted him to the police car, placed him in the back seat
15 where they left him until they returned to question him, and then questioned him while
16 he was locked in the back of the car or otherwise blocked from exiting the vehicle.
17 *Id.* Additionally, we noted that unlike *Munoz*, where the police questioning took place
18 in a vehicle in a public parking lot during the day, in *Snell* the questioning took place
19 after dark in a snowstorm that would have impaired visibility and prevented people

1 driving by from seeing what was taking place in the police car. *Snell*, 2007-NMCA-
2 113, ¶ 21.

3 Defendant's case is distinguishable from *Snell*. In *Snell*, the traffic stop rose to
4 the level of custodial interrogation because the defendant was confined in the back
5 seat of a locked police car on a night with poor visibility. Here, the detention took
6 place at a secondary area of a sobriety checkpoint, Defendant was never confined, and
7 Allen and Tidwell were both present when the canine searched the vehicle and the
8 officer asked who the bag belonged to. *See State v. Javier M.*, 2001-NMSC-030, ¶ 23,
9 131 N.M. 1, 33 P.3d 1 (reasoning that the defendant was not in custody because police
10 questioning took place in front of ten to fifteen other suspects, so it was sufficiently
11 public). Additionally, here the secondary area of the checkpoint on the side of the
12 highway was well lit, and unlike the dark snowy night in *Snell*, police actions were
13 more likely to be visible to passing motorists.

14 Defendant contends that the citation for marijuana possession is a factor to
15 consider here. However, the issuance of a citation does not elevate the investigatory
16 detention to custodial interrogation. *See Javier M.*, 2001-NMSC-030, ¶ 21.
17 Defendant points to the fact that he had been handcuffed, but he also concedes that at
18 the time of the search of the vehicle and subsequent questioning, he was not in
19 handcuffs nor was he restrained by the officers in anyway. After the canine alerted

1 to his backpack, we recognize that Defendant may have believed that he could be
2 arrested. However, we have previously held that a defendant's subjective belief as to
3 whether he would be arrested does not affect our conclusion as to whether the
4 defendant was in custody at the time he made incriminating statements to the police.
5 *Smile*, 2009-NMCA-064, ¶ 31.

6 While we agree with Defendant that, under the circumstances, a reasonable
7 person in his position might not have felt free to leave the secondary area of the
8 checkpoint, we are not persuaded that his freedom was restrained so as to rise to the
9 level of formal arrest. *See Armijo*, 105 N.M. at 773, 737 P.2d at 554 (“The fact that
10 the motorist may temporarily feel that he is not free to leave does not render him ‘in
11 custody’ for purposes of *Miranda*.”). Instead, at the time of the canine search and
12 thereafter, Defendant was not in custody but rather was subject to an investigatory
13 detention. *See Wilson*, 2007-NMCA-111, ¶ 18 (“An investigatory detention occurs
14 when an officer briefly detains and investigates a person based on reasonable
15 suspicion of criminal activity.”). After Deputy LeBoeuf developed reasonable
16 suspicion that evidence of criminal activity could be found in the truck, he summoned
17 the canine unit. We have previously held that the use of a drug dog to conduct a
18 narcotics investigation is a minimal intrusion, particularly when balanced against the
19 government's significant interest in preventing the use and distribution of illegal

1 substances. *See State v. Robbs*, 2006-NMCA-061, ¶ 22, 139 N.M. 569, 136 P.3d 570.

2 At the point the canine unit arrived, the truck and its occupants had been detained for

3 about twenty-five minutes, a reasonable length of time under the circumstances. *See*

4 *Robbs*, 2006-NMCA-061, ¶¶ 23, 25 (holding that a forty-minute detention while

5 waiting for a canine unit was permissible where the officers had reasonable suspicion).

6 We conclude that the seizure in this case did not rise to the level of custody to trigger

7 Fifth Amendment protections. *See McNeal*, 2008-NMCA-004, ¶¶ 7, 10 (holding that

8 the defendant was seized, but not in custody, after being told to step off the bus on

9 which he was a passenger as part of a narcotics investigation and questioned about the

10 contents of his luggage). “The privilege against self-incrimination is not necessarily

11 implicated whenever a person is compelled in some way to cooperate in developing

12 evidence which may be used against him.” *Armijo*, 105 N.M. at 773, 737 P.2d at 554.

13 Accordingly, although Defendant was detained, he was not obligated to respond to the

14 officer’s questioning and, thus, there is no Fifth Amendment violation. *See Javier M.*,

15 2001-NMSC-030, ¶ 19 (“During such investigatory detentions, the detainee is not

16 obliged to respond and, therefore, there is no violation of the privilege against self-

17 incrimination.”). Unless a defendant is in custody, “[o]n the scene questioning does

18 not require advisement of *Miranda* rights.” *Armijo*, 105 N.M. at 774, 737 P.2d at 555;

19 *see Javier M.*, 2001-NMSC-030, ¶ 19 (“Police officers are not constitutionally

1 mandated to forewarn citizens subject to investigatory detentions that they have the
2 right not to answer the officer's questions.”). We hold the district court did not err in
3 denying Defendant's motion to suppress the incriminating statements he made to the
4 police while subject to an investigative detention.

5 **CONCLUSION**

6 We conclude the district court's denial of Defendant's motion to suppress was
7 proper, and we affirm.

8 **IT IS SO ORDERED.**

9

10

LINDA M. VANZI, Judge

11 **I CONCUR:**

12

13

JAMES J. WECHSLER, Judge

14

TIMOTHY L. GARCIA, Judge (dissenting)

1 **GARCIA, Judge (dissenting).**

2 I respectfully dissent in this case. Even viewing the facts in the light most
3 favorable to the State, reasonable suspicions did not exist for Deputy LeBoeuf to
4 expand the traffic stop that was originally based upon an altered registration sticker
5 into an investigation for illegal drugs. Because the subsequent questioning, search,
6 and seizure of Defendant occurred after the illegal expansion of this traffic stop,
7 Article II, Section 10 of the New Mexico Constitution requires the suppression of the
8 narcotics seized from Defendant.

9 The majority correctly recognizes that during a routine traffic stop, reasonable
10 suspicion of other criminal activity may arise based upon the “evolving circumstances
11 facing an officer.” *Sewell*, 2009-NMSC-033, ¶ 22 (internal quotation marks and
12 citation omitted). In addition, the length of this particular detention was not
13 unreasonable, including the additional time Deputy LeBoeuf used to expand his initial
14 inquiry into questions about drug use. *See Van Dang*, 2005-NMSC-033, ¶ 15. The
15 questioning about drugs occurred during the time frame that Deputy LeBoeuf was also
16 legitimately investigating the issue of the altered registration sticker on the truck. It
17 is the scope of the detention that is at issue, and whether Deputy LeBoeuf had the
18 requisite reasonable suspicion to lawfully expand the scope of the investigation into
19 an inquiry about illegal drugs.

1 Without reasonable suspicion, an expansion of a routine traffic stop into an
2 inquiry about drugs is a violation of Defendant's rights under Article II, Section 10.
3 See *Leyva*, 2011-NMSC-009, ¶¶ 53-55. "[R]easonable suspicion . . . requires that
4 officers articulate a reason, beyond a mere hunch, for their belief that an individual
5 has committed a criminal act." *Funderburg*, 2008-NMSC-026, ¶ 15 (internal
6 quotation marks and citation omitted). This requirement extends to "all questions
7 asked during the stop . . . [and] ensures that investigating officers do not engage in
8 'fishing expeditions' during traffic stops." *Leyva*, 2011-NMSC-009, ¶ 55 (citation
9 omitted). We use a "fact-based, case-by-case approach to determine what questions
10 are reasonably related to the initial justification for the stop and whether an officer had
11 reasonable suspicion to expand the scope of his or her search or seizure during an
12 investigatory stop." *Id.* ¶ 54 (internal quotation marks and citation omitted).

13 It is not disputed that Deputy LeBoeuf had reasonable suspicion to investigate
14 the issues involving the altered registration sticker and the ownership of the truck.
15 The issue is whether the abrupt expansion into questions about illegal drugs was
16 simply a "hunch" and a "fishing expedition," or whether Deputy LeBoeuf's question
17 to Tidwell was grounded in a particularized and objective basis for suspecting him of
18 criminal activity. See *Funderburg*, 2008-NMSC-026, ¶ 15. I cannot conclude that the
19 factual circumstances in this case establish a reasonable basis for Deputy LeBoeuf to

1 shift the initial investigation and suddenly ask passenger Tidwell, “When was the last
2 time you used [drugs]?”

3 The majority relies upon the totality of the evolving circumstances known to
4 Deputy LeBoeuf as the basis to establish reasonable suspicion for the sudden
5 expansion of the investigation into questions about illegal drugs. Majority Opinion,
6 pp. 18-24. Deputy LeBoeuf testified that he had training and experience to recognize
7 certain characteristics of a person that might be under the influence of depressants.
8 “Not specifically heroin, but we do get training on stimulants or like depressants and
9 their effects and their characteristics as it would be on a person.” Based upon this
10 generalized training about “characteristics” of a person on depressants, Deputy
11 LeBoeuf identified the totality of the circumstances that established his objectively
12 reasonable basis to suddenly ask Tidwell about illegal drug use as follows: “Because
13 of his eyelids, because of his known history to local law enforcement as having used
14 or being in the drug business . . . [b]ased on previous knowledge of his actions, of his
15 history, plus his physical demeanor, his droopy eyes, his sleepy look, [s]o I asked him
16 that question.”

17 I disagree with the majority’s determination that reasonable suspicion of illegal
18 drug activity is established when an officer encounters a person with a known drug
19 use history, in the passenger seat of a truck near 11:00 p.m. at night, with droopy eyes

1 and a sleepy look. I consider this inquiry a classic example of a fishing expedition
2 based upon Deputy LeBoeuf's personal speculation, guess, conjecture, and hunch.

3 First, it is a matter of common knowledge that depressants are available in
4 numerous products sold over the counter and by prescription. Even if Tidwell was
5 taking a depressant, it would be speculation to immediately assume, without asking,
6 that this characteristic reasonably translates into heroin use or any other illegal drug
7 activity. Second, it is also common knowledge that people are often sleepy around
8 11:00 p.m. To assume that Tidwell's signs of droopy eyes or his sleepy look at that
9 hour of the night reasonably translates into illegal drug activity is also nothing more
10 than a hunch. Detective LeBoeuf's hunch, whether correct or not, had nothing to do
11 with an altered registration sticker or the desire to identify the owner of the truck. If
12 this factual situation qualifies as reasonable suspicion that criminal drug activity is
13 afoot, then any passenger with a drug history can be questioned at a traffic stop about
14 illegal drugs when they look sleepy or drowsy late in the night. I cannot hold that
15 these circumstances establish an objectively reasonable basis to expand a traffic stop
16 into a inquiry about illegal drugs.

17 In conclusion, I do not concur with the result reached by the majority in this
18 case. As a result, Defendant's motion to suppress the drugs seized at the traffic stop

1 in this case should have been granted by the district court.

2

3

TIMOTHY L. GARCIA, Judge