



LETAC MINNESOTA LAW ENFORCEMENT TRAINING UPDATE



Odor of Marijuana and Warrantless Motor Vehicle Searches

NEW MINNESOTA SUPREME COURT RULE

[State v. Torgerson, A22-0425 \(Minn. September 13, 2023\)](#)

QUESTION: Does the odor of marijuana, alone, emanating from a vehicle give officers “probable cause” to conduct a warrantless search of the vehicle under the automobile exception to the warrant requirement?

SHORT ANSWER – NO! The Minnesota Supreme Court recently answered this question in State v. Torgerson. This newly clarified rule states:

1) *The odor of marijuana emanating from a vehicle, alone, is insufficient to create the requisite “probable cause” to search a vehicle under the automobile exception to the warrant requirement.*

However,

2) *The odor of marijuana should be considered, along with the totality of all other circumstances, to determine whether there is “probable cause” to conduct a warrantless search of a vehicle.*

3) *In other words, to establish “probable cause,” the totality of the circumstances (e.g., odor of marijuana plus additional factors) must create a “fair probability” that marijuana is being possessed or used in a criminally illegal manner.*

Read below for how the August 1, 2023 marijuana reform legislation impacts the probable cause determination in vehicle search cases for law enforcement officers.

EXPLANATION AND ANALYSIS

Constitutional Rule of Law: In every case involving a warrantless motor vehicle search you should always start your legal analysis by applying the following constitutional rule of law:

Under the 4th Amendment EVERY Warrantless Search of a Motor Vehicle is Presumptively Unlawful UNLESS The Search Falls Within One of Seven (7) Recognized Exceptions to the 4th Amendment:

1. **Probable Cause Search for Evidence (e.g., Automobile Exception)**
2. Plain View Seizure
3. Search Incident to Arrest
4. Inventory Search
5. Protective Weapons Search
6. Consent Search
7. Medical Emergency Search (this falls under the general “exigency” exception)

What is the Probable Cause Search Exception? (Automobile Exception)

- 1) The automobile exception permits a police officer to search an automobile without a warrant, including closed containers in that car, if there is “probable cause to believe the search will result in discovery of evidence or contraband.” *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016).
- 2) Probable cause to search exists when, under the totality of the circumstances, there is a “fair probability” that contraband or evidence of a crime will be found in a particular place. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).
- 3) “Probable cause” is an objective inquiry that depends on the totality of the circumstances in each case. *Torgerson at 16*. This is a “common-sense, nontechnical concept that involves the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.” *Id at 8*.
- 4) In determining probable cause, an officer may rely on his/her training and experience to draw inferences and make deductions that might well elude untrained persons. *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011).

Key Facts About Minnesota's Cannabis Reform Legislation (effective August 1, 2023)

- 1) Minnesota is the 23rd State to Legalize Recreational Marijuana (with limitations);
- 2) The new legislation is long (319 legal-sized pages) and complex ([click here](#));
- 3) Recreational use of marijuana is now legal for adults 21 and older (with limitations);
- 4) Possession of two ounces or less of marijuana in public is no longer a crime;
- 5) Possession of two pounds or less of marijuana at home is not a crime;
- 6) You can grow up to 8 marijuana plants (with limitations);
- 7) There are numerous limitations and prohibitions on where you can use or possess;
- 8) Selling cannabis without a license could result in criminal and financial sanctions;
- 9) Marijuana is still illegal under Federal law. (However, there is currently a federal policy of non-enforcement against people who are state-law compliant.)



10) **MARIJUANA IN A MOTOR VEHICLE IS STILL A CRIME (M.S. 169A.36)**

- a. This is now called the “Marijuana in a Motor Vehicle” or “Open Package Law” crime. **Any amount** of marijuana (e.g., cannabis flower, cannabis product (concentrates), or cannabis edibles) is a misdemeanor to use or possess in a motor vehicle, unless it is sealed in the original approved packaging or in other packaging allowed by statute (2 oz or less) or is in the trunk or the equivalent of a trunk (2 oz or less) (any amount over 2 oz would be charged under [MS 152.0263, Subd 1-4.](#))
- b. **The old “Roach Exception” is gone.** Under the previous statute (M.S. 152.027, Subd. 3) there was an exception that allowed an extremely small amount of marijuana (1.4 grams) to be in a vehicle without criminal penalty (referred to as the petty misdemeanor *roach exception*). That provision was repealed by the new legislation.
- c. **There are several exceptions to the crime of “Marijuana in a Motor Vehicle”:**
 - i. **Marijuana sealed** in the original approved packaging or in other packaging allowed by statute (2 oz or less) is not illegal.
 - More than 2 oz would be charged under [M.S. 152.0263, Subd 1-4.](#)
 - ii. **Marijuana stored in the trunk** or equivalent of a trunk (2 oz or less) is not illegal.
 - More than 2 oz would be charged under [M.S. 152.0263, Subd 1-4.](#)
 - iii. **Industrial Hemp** is cannabis that contains less than 0.3% THC, whereas marijuana is cannabis that contains more than 0.3% THC. Because Hemp is NOT marijuana the possession or use of Hemp in a motor vehicle is not illegal. Note to drivers: The look and smell of Hemp is almost identical to marijuana.
 - iv. **Excludes** Buses, Limousines & Commercial Bicycles with 5 or more passengers.

State v. Torgerson, A22-0425 (Minn. September 13, 2023)

FACTS: In 2021, Torgerson’s vehicle was lawfully stopped for an equipment violation. Torgerson did not commit a traffic violation or drive in an unsafe or erratic manner. A woman and a minor child were passengers sitting in the front seat. Two officers testified they could smell the medium-strength odor of burnt marijuana coming from inside the vehicle. There was no indication of impairment or intoxication of either Torgerson or his passengers.

Based on the medium-strength odor of marijuana alone, officers searched the vehicle. Inside the center console officers found three pipes and several containers with methamphetamine.

Torgeson was charged with multiple felony-controlled substance offenses. The District Court dismissed the charges finding that the odor of marijuana alone did not provide probable cause for officers to search the vehicle. The Court of Appeals affirmed the District Court order.

SUMMARY OF SUPREME COURT RULING:

- 1) Evidence of the odor of marijuana, on its own, with no additional factors, is insufficient to establish probable cause (fair probability) that the search would yield evidence of illegal drug-related contraband or conduct. *Id at 20.*
- 2) However, the odor of marijuana should be considered along with the totality of all other circumstances to determine whether there is a “fair probability” that a search will yield contraband or other evidence that marijuana is being used in a criminally illegal manner.
- 3) The odor of marijuana, alone, is no longer evidence of a crime because the odor could be coming from several non-criminal lawful sources. (e.g., the use of medical marijuana, or industrial hemp, both of which were lawful at the time of Torgerson’s arrest).
Note: As of 8/1/2023 the odor could also be from the use of legal recreational marijuana.
- 4) In addition, the possibility of an innocent justification or explanation for the odor of marijuana (e.g., as of August 1st, driver claims he smoked marijuana earlier at home) merely affects that factor’s weight and persuasiveness, not its inclusion in the totality of the circumstances analysis. *Id at 18.*
- 5) Because the 2023 marijuana reform law was not in effect at the time of Torgerson’s arrest the Supreme Court did not discuss this change in the law and instead relied on the law in effect at the time of Torgerson’s arrest. Future cases, considering the 2023 marijuana reform law, will no doubt continue to further define this evolving area of the law.

Law Enforcement “Best Practices” For Determining Probable Cause (Ten Valuable Reminders)

- 1) **Gone are the days** when the mere odor of marijuana was enough to establish probable cause to search a vehicle. Now that recreational marijuana for adults is legal how do you establish probable cause to search a vehicle?
- 2) **Whenever you search a vehicle** always assume your search will be challenged and you will have to justify that warrantless search to a District Court Judge.
- 3) **Remember**, although recreational marijuana use is now legal for adults, it is still a misdemeanor to possess or use ANY amount of marijuana in a motor vehicle, *unless it is sealed in the original approved packaging or in other packaging allowed by statute (2 oz or less) or is in the trunk or the equivalent of a trunk (2 oz or less) (any amount over 2 oz would be charged under [MS 152.0263, Subd 1-4.](#))*
- 4) **Standard question:** If you detect the odor of marijuana coming from a vehicle, always ask the driver if there is an explanation for the odor. This gives the driver an opportunity to provide an innocent justification or explanation for the odor (e.g., adult driver says he was smoking marijuana at his home before driving, etc.). The driver is not obligated to answer your question but failure to answer is another factor you can consider for probable cause under the totality of circumstances analysis.
 - a. **And do not forget**, a driver’s innocent explanation for the odor of marijuana merely affects that factor’s weight and persuasiveness, not its inclusion in the totality of the circumstances analysis.
- 5) **The Rule of 5:** If you believe there is evidence of a crime in a vehicle, try to identify 3 to 5 factors (in addition to the odor of marijuana) that you believe establish probable cause. This rule helps you focus on identifying multiple relevant factors, some of which may be subtle and otherwise overlooked.
- 6) **Training and Experience:** When determining probable cause, an officer may rely on his/her training and experience to draw inferences and make deductions that might well elude untrained persons. You do this every day, often on a subconscious level. Make sure you provide an explanation for your inferences/deductions in your report.

- 7) **Use “Because”:** When developing probable cause to justify the warrantless search of a vehicle, the most important word you can use is “because.” Using this word helps you focus on each individual factor you are relying on to justify the search. For example:
 - a. I believe there is probable cause to search this vehicle:
 - i. Because (Factor # 1) (Factor # 2) (Factor # 3) etc.
- 8) **Your Police Report:** When determining probable cause, no matter how many relevant factors you rely on to justify the search of the vehicle, if those factors do not make their way into your report, it is very difficult to raise them later when testifying in front of a judge. That is called doing the defense attorneys’ job for them.
- 9) **Your Reputation:** If the totality of the circumstances does not support probable cause to search, then do not search - let it go. Risking your reputation with attorneys and the court over a clearly bad search is simply not worth it.
- 10) **At the end of the day:**
 - a. If you understand the Supreme Court decision in *Torgerson*; and,
 - b. You understand the new “Marijuana in a Motor Vehicle” crime; and,
 - c. You have followed the above suggestions for developing probable cause; and,
 - d. You would feel confident explaining your basis for probable cause to a Judge;

Then don’t worry about whether the judge ends up agreeing with you or not.

Arguments in Support of Legalized Marijuana: Whether you agree with legal recreational marijuana or not, it is important that you understand the legal and scientific issues involved. Some of the most compelling arguments in support of legalized marijuana can be found on the [Criminal Defense website of Attorney Thomas Gallagher](#), [click here](#).

RESOURCES: [Anoka County Attorney’s Office](#); Thomas Gallagher, Attorney, [gallagherdefense.com](#); Mike Brandt, Attorney, [bkdefense.com](#); [LETAC](#); Pat Fugina, Attorney (Retired)



Alan F. Pendleton, Attorney (former district court judge)
afpendleton@gmail.com; pendletonupdates.com; [linkedin.com](#)

