

MARTINE LAW TRAINING UPDATE

Odor of Marijuana and Warrantless Motor Vehicle Searches

[*State v. Torgerson*, 995 N.W.2d \(Minn. 2023\)](#)

2023 Recreational Marijuana Reform Act

Marijuana/Cannabis in a Motor Vehicle Crime M.S. 169A.36

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 constitutional 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.

Note: In 2024, the Minnesota legislature codified the holding in *State v. Torgerson* by enacting **M.S. 626.223** “Odor of Cannabis; Search Prohibited.”

The Automobile Exception to the 4th Amendment Warrant Requirement

Constitutional Rule of Law: In every case involving a warrantless motor vehicle search, 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. **Search Based on Probable Cause (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 elude untrained persons. *State v. Koppi*, 798 N.W.2d 358 (Minn. 2011).

State v. Torgerson, 995 N.W.2d 164 (Minn. 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.

Torgerson was charged with multiple felony controlled substance offenses. The District Court dismissed the charges, ruling 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 evaluated in the context of the totality of the circumstances to determine whether there is a "fair probability" that a search will uncover contraband or other evidence of marijuana being used in a criminally unlawful manner.
- 3) The odor of marijuana, alone, is not evidence of a crime because the odor could be from several non-criminal lawful sources. For example, medical marijuana, zero THC hemp, or as of August 1, 2023, from the use of legal recreational marijuana.

Note: In 2024, the Minnesota legislature codified the holding in *State v. Torgerson* by enacting **M.S. 626.223** ODOR OF CANNABIS; SEARCH PROHIBITED. "*A peace officer's perception of the odor of cannabis shall not serve as the sole basis to search a motor vehicle, or to search the driver, passengers, or any of the contents of a motor vehicle.*"

2023 Marijuana Reform Legislation (effective 8/1/2023)

Ten (10) Key Facts

- 1) The terms “Marijuana” and “Cannabis” are interchangeable.
- 2) To be considered “Marijuana/Cannabis,” it must have a THC level of more than 0.3%.
- 3) If the suspected substance has 0.3% THC or less, it is classified as “Hemp.”
- 4) The look, feel, and smell of Hemp is identical to Marijuana/Cannabis.
- 5) The use or possession of Hemp is LEGAL because the THC level is 0.3% or less.
- 6) **Recreational use** of Cannabis is legal for adults age 21 and older, subject to limitations.
 - a. Adults 21+ may use marijuana in public places unless in a motor vehicle or unless the location is specifically prohibited by state law (e.g., schools, federal property, correctional facilities, etc.) or restricted by local ordinances. Cities and counties may pass ordinances to further limit or ban marijuana use in parks, sidewalks, events, or other public spaces within their jurisdiction. M.S. 342.09 & 342.13(a).
 - b. Possession of two ounces or less of Cannabis in public is no longer a crime;
 - c. Possession of two pounds or less of Cannabis at a private home is not a crime;
 - d. You can grow up to 8 Cannabis plants at your primary residence (with limitations);
- 7) **Penalties for Minors vs. Adults:** There is no longer a state-level petty misdemeanor offense for adult cannabis use or possession—violations by adults are now charged as either misdemeanors or felonies. However, minors (under age 21) may still be charged with a petty misdemeanor for unlawful use or possession of cannabis outside of a motor vehicle. In addition, cities and counties may enact ordinances that impose petty misdemeanor penalties for cannabis use or possession in designated public places within their jurisdictions. M.S. 152.0263, Subd 5
- 8) **Selling cannabis** without a proper state license remains illegal;
- 9) **Federal Law Reminder:** Although cannabis is still illegal under federal law as a Schedule I controlled substance, alongside heroin and LSD, the federal government has generally followed a policy of non-enforcement or non-interference with individuals and businesses operating in compliance with state laws. Federal enforcement is typically limited to large-scale trafficking or interstate distribution.
- 10) **Possession or use of Marijuana in a motor vehicle is still illegal – M.S. 169A.36:**

MARIJUANA IN A MOTOR VEHICLE IS STILL A CRIME (M.S. 169A.36)**1) Minn. Stat. § 169A.36 – Marijuana in a Motor Vehicle (“Open Package” Law)**

This statute was intended to resemble M.S. 169A.35 “Open Bottle Law,” which makes alcohol in a motor vehicle a crime. As of August 1, 2023, it is also a misdemeanor for any person to use or possess marijuana flower, marijuana products, lower-potency hemp edibles, or any hemp-derived product containing any amount of THC (even < 0.3%) in the passenger area of a motor vehicle on a public street or highway, **unless one of the following exceptions applies:**

- a. The product is in its original packaging or in statutorily compliant packaging and is within lawful possession limits (e.g., 2 oz or less); or
- b. The product is within lawful possession limits (e.g., 2 oz or less) and stored in the trunk or another area not normally occupied by passengers (sealed packaging not required). A utility compartment or glove compartment is deemed to be within the passenger area of the motor vehicle.

Note: Possession of more than the legal limit (e.g., > 2 oz) is a separate offense under M.S. 152.0263, regardless of packaging or storage location. Depending on the quantity of marijuana, penalties range from a petty misdemeanor to a felony.

- 2) **Possessing a medical marijuana card is not a defense** to a charge under the cannabis-in-a-motor-vehicle statute. Minnesota’s Medical Cannabis Program allows registered patients to use marijuana for medical purposes, but this does not exempt them from the restrictions on using or possessing THC products in a motor vehicle. Even medical cannabis must be properly packaged and stored to comply with § 169A.36.
- 3) **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 or less) to be in a vehicle without criminal penalty (referred to as the petty misdemeanor roach exception). That provision was repealed by the new legislation.
- 4) **Excludes** Buses, Limousines, and vehicles operated for commercial purposes in a manner similar to a bicycle as defined in section [169.011, subdivision 4](#), with five or more passengers who provide pedal power to the vehicle's drive train.

5) **Liability of Non-Present Vehicle Owners:** Under M.S. 169A.36, subd. 4, it is a crime for a vehicle owner, even if not present, to knowingly allow THC-containing products to be kept in the vehicle in noncompliant packaging while on a public road. This is not a strict liability offense; the state must prove the owner was aware of and permitted the violation. Both the driver and the absent owner may be charged.

6) **Marijuana vs. Hemp – Common Misconception:** Some believe that the Marijuana in a Motor Vehicle statute (M.S. 169A.36) applies only to marijuana or cannabis products with more than 0.3% THC. That's only partially correct.

The statute also applies to hemp-derived products, including "lower-potency hemp edibles" and "hemp-derived consumer products," which may contain 0.3% THC or less. Even though these products are legal under other state laws, they are unlawful to use or possess in the passenger area of a motor vehicle on a public road unless they meet an exception (e.g., sealed packaging or trunk storage).

7) **Key takeaway for attorneys:** The statute's inclusion of hemp edibles, hemp-derived consumer products, and artificially derived cannabinoids reflects a clear legislative intent to regulate all THC-containing products, not just marijuana. In other words, M.S. 169A.36 does not distinguish if the THC comes from cannabis or hemp. If any detectable amount of THC is present—even under 0.3%—the statute applies. If the product does not contain THC at all, it is not covered by this statute.

RESOURCES: [Kalen Best, Attorney, Martine Law Firm](#); Thomas Gallagher, Attorney, [gallagherdefense.com](#) (the Gallagher defense website contains some of the most compelling legal and scientific arguments supporting legalized marijuana).

STATUTORY REFERENCES: M.S. 169A.36 (Use of cannabis in a motor vehicle); M.S. 342.21 (Packaging and transport requirements); M.S. 342.01, Subd (Definitions of cannabis and hemp-derived consumer products); M.S. 152.0263 (Possession over 2 oz). M.S. 342.09 (Personal adult use of cannabis, sale, and home cultivation)

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