MINNESOTA JUDICIAL TRAINING UPDATE

ODOR OF MARIJUANA AND WARRANTLESS MOTOR VEHICLE SEARCHES

2023 RECREATIONAL MARIJUANA REFORM ACT

MARIJUANA 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 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. *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023). **However,** the odor of marijuana should be evaluated in the context of the "totality of the circumstances" (e.g., odor of marijuana plus additional factors) to determine whether there is a "fair probability" that marijuana is being possessed or used in a criminally illegal manner.

✓ **Rationale:** The odor of marijuana, alone, is not evidence of a crime because the odor could be from several non-criminal lawful sources. (e.g., medical marijuana, lawful hemp, or as of August 1, 2023, from the use of legal recreational marijuana.)

Legislative Enactment: In 2024, Minnesota codified *Torgerson* and extended its protection to drivers, passengers, and vehicle contents: cannabis odor alone cannot justify a search. Minn. Stat. § 626.223 Odor of Cannabis; Search Prohibited.

What About Reasonable Suspicion? Under the Minnesota Constitution, marijuana odor alone does not provide "reasonable suspicion" of criminal activity sufficient to expand a traffic stop. *State v. Babineau*, 23 N.W.3d 396 (Minn. App. 2025).

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 173.* 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 169.*

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).*

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

Ten (10) Key Facts

1) The terms **"Marijuana" and "Cannabis"** are generally interchangeable, but the legislature now favors and uses the term "cannabis" over the older term "marijuana".
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** are 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.
   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) **Petty Misdemeanor:** M.S. 152.0263, Subd. 4. "Possession of Cannabis in The Fourth Degree". A person is guilty of a petty misdemeanor if the person unlawfully possesses any of the following:
   a. More than two ounces but not more than four ounces of cannabis flower (i.e., dry or smokable marijuana) in any place other than the person's residence;
   b. More than eight grams but not more than 16 grams of cannabis concentrate (i.e., high-potency extract); or
   c. Edible cannabis products, lower-potency hemp edibles, or hemp-derived consumer products infused with more than 800 milligrams but not more than 1,600 milligrams of tetrahydrocannabinol."

✓ **Minors (under age 21)** may be charged with a petty misdemeanor for unlawful use or possession of any amount of cannabis outside of a motor vehicle.

- ✓ **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. 342.09 & 342.13(a); M.S. 152.0263, Subd. 5.

8) **Selling cannabis** without a proper state license remains illegal;

9) **Federal Law Reminder:** In April 2026, qualifying state-licensed medical marijuana and FDA-approved marijuana products moved to Schedule III. Adult-use marijuana remains federally illegal under Schedule I (i.e., alongside heroin and LSD); broader rescheduling remains pending.
   - ✓ **Federal Non-Enforcement Policy:** Federal authorities generally refrain from targeting individuals and businesses complying with state cannabis laws, prioritizing major trafficking and interstate distribution, but immunity is not guaranteed.

10) 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)**
   As of August 1, 2023, it is 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 cannabis flower exceeding the applicable legal limit—more than 2 ounces outside the person's residence or more than 2 pounds at the person's residence—is a separate offense under Minn. Stat. § 152.0263, subds. 1-4, regardless of packaging or placement within a vehicle. Depending on the quantity unlawfully possessed, penalties range from a petty misdemeanor to a felony.

2) **Being enrolled in Minnesota's medical cannabis program is not a defense** to a charge under the cannabis-in-a-motor-vehicle statute. The 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 roach exception). The new legislation repealed that provision.

4) **Potential Statutory Loophole — Unpackaged Cannabis:** Some defense attorneys argue that Minn. Stat. § 169A.36, subd. 3, contains a statutory gap because its prohibitions focus on packaging and therefore may not cover homegrown, legacy-market, or loose marijuana (including a "roach") that was never packaged.
   - **However,** in *State v. Roberson*, No. A25-0886 (Minn. App. May 4, 2026) (nonprecedential), the Court of Appeals rejected the argument that the statute applies only to commercially purchased cannabis, holding that its plain language also encompasses cannabis in opened, noncommercial packaging. Because *Roberson* involved marijuana in an open plastic bag, **whether completely unpackaged marijuana violates the statute remains unresolved.** As a practical matter, laboratory testing of trace amounts by the state may be unlikely.

5) **The Statute 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.

6) **Liability of Vehicle Owners and Drivers:** Under § 169A.36, subd. 4, a vehicle owner—or the driver when the owner is absent—may be criminally liable for keeping or allowing THC-containing products in the vehicle in noncompliant packaging on a public road. This is not a strict liability offense; the state must prove the owner knew about and permitted the violation. Both the driver and the absent owner may be charged.

7) **Marijuana vs. Hemp – Common Misconception:** Some mistakenly believe Minn. Stat. § 169A.36 applies only to marijuana containing more than 0.3% THC. However, the statute also covers lower-potency hemp edibles and hemp-derived consumer products,

which may contain 0.3% THC or less. These products are subject to the same motor vehicle restrictions, including applicable packaging and storage requirements.

8) **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 whether the THC comes from cannabis or hemp. If the product contains any amount of THC, it is covered by this statute.

SPECIAL THANKS TO ATTORNEY TOM GALLAGHER for sharing his extensive experience and insights in the writing of this update. For anyone interested in delving deeper into the world of legal marijuana, I encourage you to visit the Gallagher Defense website at gallagherdefense.com (it contains a wealth of information on most law-related marijuana issues).

Alan F. Pendleton, Of Counsel, Martine Law Firm; Director of Mentorship and Education, Former District Court Judge; alan@xmartinelaw.com; Minnesota Judicial Training & Education Resource Center.