STATE OF MINNESOTA

IN SUPREME COURT

A22-0425

Court of Appeals | McKeig, J.
Dissenting, Gildea, C.J., Anderson, J.

State of Minnesota,

Appellant,

vs. | Filed: September 13, 2023
Office of Appellate Courts

Adam Lloyd Torgerson,

Respondent.

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brandi L. Schiefelbein, Meeker County Attorney, John P. Fitzgerald, Assistant County Attorney, Travis J. Smith, William C. Lundy, Special Assistant County Attorneys, Slayton, Minnesota, for appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Melvin R. Welch, Welch Law Firm, LLC, Minneapolis, Minnesota, for respondent.

Teresa Nelson, American Civil Liberties Union of Minnesota, Minneapolis, Minnesota; and

Julian Clark, American Civil Liberties Union Foundation, New York, New York, for amici curiae American Civil Liberties Union Foundation and American Civil Liberties Union of Minnesota.

Shauna Faye Kieffer, Jay M. Wong, Minnesota Association of Criminal Defense Lawyers, Roseville, Minnesota, for amicus curiae Minnesota Association of Criminal Defense Lawyers.

Robert Small, Executive Director, Bill Lemons, Traffic Safety Resource Prosecutor, Minnesota County Attorneys Association, Saint Paul, Minnesota;

Tyler Kenefick, Assistant St. Louis County Attorney, Hibbing, Minnesota; and

Kevin A. Hill, Assistant Carver County Attorney, Chaska, Minnesota, for amicus curiae Minnesota County Attorneys Association.

Mahesha P. Subbaraman, Subbaraman PLLC, Minneapolis, Minnesota, for amici curiae Restore the Fourth, Inc., Restore the Fourth Minnesota, and Sensible Minnesota.

S Y L L A B U S

1. The odor of marijuana is one of the circumstances in the totality of circumstances analysis that should be considered in determining if there is a "fair probability" that contraband or evidence of a crime will be found in the location searched.

2. Because it is undisputed that there were no other circumstances supporting the probable cause determination in this case other than the odor of marijuana emanating from the vehicle, there was not a fair probability that the search would lead to the discovery contraband or evidence of a crime, and therefore the evidence obtained during the search must be suppressed.

Affirmed.

O P I N I O N

MCKEIG, Justice.

Appellant State of Minnesota charged respondent Adam Lloyd Torgerson with possession of methamphetamine paraphernalia in the presence of a minor and fifth-degree possession of a controlled substance after a traffic stop and subsequent search of

Torgerson's vehicle. This search was justified only by the odor of marijuana emanating from the vehicle. Torgerson moved to suppress the evidence found during the search, arguing that the odor of marijuana, alone, is insufficient to create the requisite probable cause to search a vehicle under the automobile exception to the warrant requirement. The district court granted Torgerson's motion, suppressed the evidence, and dismissed the complaint. The State appealed. The court of appeals affirmed the district court's suppression order. Because we conclude that 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, we affirm.

FACTS

On July 5, 2021, just before 10 p.m., a Litchfield Police Officer stopped a motor vehicle because the light bar mounted on the vehicle's grill had more auxiliary driving lights than permitted by Minnesota statute. *See* Minn. Stat. § 169.56 (2022) (providing the auxiliary light law). The officer approached the vehicle and asked the driver, Adam Lloyd Torgerson, for his license and registration. Torgerson, his wife, and his child were in the vehicle. The officer stated that he smelled marijuana and asked Torgerson if there was any reason for the odor. Torgerson answered no, stated he did not have marijuana on him, and denied ever having marijuana in the vehicle.

The officer and Torgerson spoke briefly about the vehicle's light bar before the officer returned to his squad car with Torgerson's license and registration. While the officer verified Torgerson's license and registration, a second officer arrived on the scene. The first officer explained to the second officer that he thought he smelled marijuana

coming from the vehicle and that Torgerson denied possessing marijuana. The second officer approached the vehicle and spoke briefly with Torgerson and his wife before asking if there was marijuana in the vehicle, noting that he and his partner could both smell marijuana coming from inside the vehicle. The couple, again, denied possessing marijuana, but Torgerson admitted to smoking marijuana in the distant past. The second officer stated that the marijuana odor gave them probable cause to search the vehicle and directed everyone to exit the vehicle.

The first officer searched the vehicle and found a film cannister, three pipes, and a small plastic bag in the center console. The plastic bag contained a powdery, white substance, and the film cannister contained a brown crystal-like substance. A field test of the brown crystal-like substance tested positive for methamphetamine. The officers arrested Torgerson for possession of a controlled substance after he admitted ownership of the contraband.

The State charged Torgerson with one count of possession of methamphetamine paraphernalia in the presence of a minor in violation of Minn. Stat. § 152.137, subd. 2(a)(4) (2022), and one count of fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(1) (2022).

Torgerson moved to suppress the evidence obtained from the vehicle search and dismiss the complaint, arguing that the officers illegally expanded the traffic stop into a search without the requisite probable cause. The district court held a contested omnibus hearing and the parties stipulated to one exhibit—the body-worn camera footage from each officer—and the court heard testimony from both officers and Torgerson's wife.

At the suppression hearing, the first officer testified that he "could smell a strong odor of burnt marijuana" emanating from the vehicle and that Torgerson denied possessing any marijuana. He also recalled telling the second officer that he "could smell marijuana and it wasn't rolling out of the vehicle," which he explained meant that he could not smell the marijuana odor before approaching the vehicle. The first officer ranked the strength of the odor as a five on a scale from one to ten. He also claimed that he could recognize the difference between the odor of burnt and unburnt marijuana, describing that "for [him]," burnt marijuana has "more of like a skunkier smell, more strong smell." The second officer testified that he is trained on the odor of marijuana and that he "could immediately [smell] the odor of burnt marijuana coming from inside the vehicle."[1] The odor "was strong enough that [he] immediately recognized it when [he] got to the window." "It definitely wasn't the faintest" odor of marijuana he had ever smelled, but "it definitely wasn't the strongest." Neither officer could recall seeing any indicia that Torgerson was impaired.

After the hearing, the district court ordered that all the evidence obtained as a result of the search be suppressed and dismissed the complaint. The district court made findings of fact consistent with the testimony—both officers smelled the odor of marijuana emanating from Torgerson's vehicle, the officers justified the vehicle search solely on that

[1] The record does not describe the training the officers received on detecting the odors of marijuana.

odor of marijuana, neither officer observed any indicia of impairment, and neither officer saw any contraband or substances in plain view.[2]

The district court explained that Minnesota case law does not permit vehicle searches solely because adult passengers smell like alcohol, *see State v. Burbach*, 706 N.W.2d 484 (Minn. 2005), and analogized that the same analysis should apply to the odor of marijuana, given that possession of a certain amount of marijuana is a non-criminal petty misdemeanor, *see* Minn. Stat. §§ 152.027, subd. 4(a), 152.01, subd. 16 (2022). Consequently, the district court determined the items found in the search of Torgerson's vehicle were fruit of the poisonous tree because they were seized during an illegal search and, therefore, should be suppressed.

The State appealed. The court of appeals affirmed the district court's suppression order. *State v. Torgerson*, No. A22-0425, 2022 WL 6272042, at *1 (Minn. App. Oct. 10, 2022). The court of appeals asserted that it did not "reach the issue of whether the odor of marijuana, alone, is enough to establish probable cause." *Id.* at *2. The court of appeals explained that the officers did not witness Torgerson drive unsafely or erratically, did not recall Torgerson displaying any indicia of impairment, nervous or evasive behavior, or

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[2] The district court made a number of factual findings and conclusions of law that were not based on the record. The court of appeals rejected the factual findings and legal conclusions that were unsupported by the record or not meaningfully tied to the factual findings. *See State v. Torgerson*, No. A22-0425, 2022 WL 6272042, at *3 (Minn. App. Oct. 10, 2022). The court of appeals also noted that the district court's memorandum was "filled with statements that could reasonably cause a reader to question the [district] court's impartiality." *Id.* Consequently, the court of appeals rejected the district court's "gratuitous comments." *Id.* at *4. The court of appeals' rejection of those findings and conclusions was not appealed and, therefore, is not before our court.

furtive movements, and did not see any drug paraphernalia in plain view in the vehicle. *Id.* at *3.

We granted the State's petition for further review.

ANALYSIS

This case requires us to assess the parameters of the probable cause test as it applies to automobile exception cases involving the odor of marijuana, and then to apply the test to Torgerson's motions to suppress evidence and dismiss the complaint.[3] We address each issue in turn.

I.

We review a district court's probable cause determination as it relates to a warrantless search de novo. *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) ("We review de novo a trial court's determination of probable cause as it relates to a warrantless search"); *see also State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (holding that when facts are not in dispute, this court reviews a suppression order de novo to determine whether police articulated an adequate basis for the search).

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[3] In the alternative, the State asks this court to apply the good-faith exception to the exclusionary rule as articulated in *State v. Lindquist*, 869 N.W.2d 863, 871 (Minn. 2015), if the court determines that probable cause was lacking. However, the State failed to raise this argument to the court of appeals or the district court, so the argument is forfeited, and we decline to consider it. *See Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020) ("An issue is not properly before our court when it is raised '[f]or the first time in [a party's] brief to our court.' " (quoting *State v. Campbell*, 814 N.W.2d 1, 4 n.4 (Minn. 2012))). The State did not challenge the district court's determination that the doctrine of the poisonous tree required the suppression of the State's remaining evidence outside of its probable cause and *Lindquist* exception arguments.

Both the United States Constitution and the Minnesota Constitution protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "[S]earches conducted outside of the judicial warrant process are per se unreasonable" unless "one of the well-delineated exceptions to the warrant requirement" applies. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). One of these well-delineated exceptions, the automobile exception, permits police to "search a car without a warrant, including closed containers in that car, if there is 'probable cause to believe the search will result in a discovery of evidence or contraband.' " *Lester*, 874 N.W.2d at 771 (quoting *State v. Search*, 472 N.W.2d 850, 852 (Minn. 1991) (citing *United States v. Ross*, 456 U.S. 798, 809 (1982))).

"Probable cause requires something more than mere suspicion but less than the evidence necessary for conviction." *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). "Probable cause is an objective inquiry that depends on the totality of the circumstances in each case." *Lester*, 874 N.W.2d at 771. 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.* (quoting *State v. Lee*, 585 N.W.2d 378, 382 (Minn. 1998)). Even so, a warrantless search of a vehicle " 'must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers.' " *Munson*, 594 N.W.2d at 136 (quoting *Ross*, 456 U.S. at 808). Probable cause is a fluid concept that takes its "substantive content from the particular contexts in which [probable cause is] being assessed." *Lee*, 585 N.W.2d at 382. It "exists when there is a 'fair probability that contraband or evidence of a crime

will be found in a particular place.' " *Onyelobi v. State*, 932 N.W.2d 272, 281 (Minn. 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

The State argues that there is established precedent from our court and the United States Supreme Court that clearly holds the odor of marijuana, alone, is sufficient to support probable cause to search a vehicle under the automobile exception. Conversely, Torgerson argues that under the totality of circumstances test, the odor of marijuana, alone, cannot create the requisite probable cause to search a vehicle under the automobile exception.[4]

Before addressing the parties' arguments and the relevant caselaw relating to the probable cause standard, we review Minnesota's legal landscape surrounding marijuana.

A.

Minnesota statutes list "[m]arijuana, tetrahydrocannabinols, and synthetic cannabinoids" as a category of "Schedule I" controlled substances "*[u]nless specifically excepted*." Minn. Stat. § 152.02, subd. 2(h) (2022) (emphasis added).[5] Consequently,

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[4] Torgerson also argues that the State failed to meet its burden to prove that reasonable suspicion supported expansion of the traffic stop. This argument was not presented to either the district court or the court of appeals. Consequently, the argument is forfeited and we decline to address the issue. *See Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020) ("An issue is not properly before our court when it is raised '[f]or the first time in [a party's] brief to our court.' " (quoting *State v. Campbell*, 814 N.W.2d 1, 4 n.4 (Minn. 2012))).

[5] The State contends that all marijuana is contraband under this statutory definition. This argument is unavailing given that the statute itself explicitly states that "specifically excepted" forms of marijuana are not Schedule I controlled substances. *See* Minn. Stat. § 152.02, subd. 2(h)(1)–(2). We also note that the State does not argue chapter 152 is preempted by federal law, so we decline to address the issue.

marijuana that is "excepted" is not a controlled substance. Minnesota statutes had three exceptions to this controlled substances category at the time of Torgerson's arrest.[6]

The first exception is industrial hemp. The aforementioned controlled substances category generally includes "marijuana," and "tetrahydrocannabinols," but not "industrial hemp" as defined in statute. Minn. Stat. § 152.02, subd. 2(h)(1)–(2). Marijuana is defined as "all parts of the plant of any species of the genus Cannabis." Minn. Stat. § 152.01, subd. 9 (2022). Industrial hemp is defined as "the plant Cannabis sativa L. and any part of the plant . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Minn. Stat. § 18K.02, subd. 3 (2022). Industrial hemp is derived from a cannabis plant but contains a lower amount of tetrahydrocannabinol, or THC.[7]

The second exception is medical cannabis under Minnesota's medical cannabis registry program. *See* Minn. Stat. § 152.22–.37 (2022). Under this program, "[t]here is a

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[6] While not relevant to Torgerson's case because he was charged in 2021, House Bill 100, H.F. 100 (93rd Minn. Leg. 2023) was signed by the Governor in 2023; this bill addresses legalization and regulation of the personal adult use, possession, and transportation of cannabis and related marijuana products in Minnesota. Act of May 30, 2023, ch. 63, 2023 Minn. Laws __. Given that this law was not in effect at the time of Torgerson's arrest and, consequently, cannot impact the outcome of Torgerson's case, we do not discuss this change in the law and instead rely on and review the law in effect at the time of Torgerson's arrest.

[7] The State argues *State v. Dixon*—which discussed the distinction between marijuana and hemp—supports its argument. Yet, *Dixon* is distinguishable because the court's holding had nothing to do with the legality of a warrantless search. 981 N.W.2d 387, 389–95 (Minn. 2022) (holding that the defendant's admission that the material seized in a traffic stop was marijuana was enough to survive a motion to dismiss for lack of probable cause when the defendant moved to dismiss because there was no proof the material seized was marijuana rather than hemp).

presumption that a patient enrolled in the registry program . . . is engaged in the authorized use of medical cannabis." Minn. Stat. § 152.32, subd. 1(a). Medical cannabis is defined as "any species of the genus cannabis plant" delivered in specific forms delineated by statute. Minn. Stat. § 152.22, subd. 6(a).[8] The program provides that use or possession of medical cannabis is not a violation of the law for patients enrolled in the program. Minn. Stat. § 152.32, subd. 2(a). Consequently, there are citizens who are lawfully permitted to possess and use medical cannabis, meaning medically approved cannabis is not contraband for those patients.

Finally, Minnesota's criminal statutes provide that possession of a "small amount" of marijuana is a petty misdemeanor. Minn. Stat. § 152.027, subd. 4(a) (2022). Small amount means 42.5 grams or less. Minn. Stat. § 152.01, subd. 16 (2022). Additionally, possession of less than 1.4 grams of marijuana in a car is a petty misdemeanor. *See* Minn. Stat. § 152.027, subd. 3 (providing that possession of *over* 1.4 grams of marijuana in a vehicle is a misdemeanor). A petty misdemeanor is an "offense which is prohibited by statute" but "does not constitute a crime." Minn. Stat. § 609.02, subd. 4a (2022). Possession of marijuana, consequently, is not always a crime.

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[8] These forms include, but are not limited to, liquid/oil form, a vaporized delivery method, and combustion with use of dried raw cannabis. Minn. Stat. § 152.22, subd. 6(a)(1),(3),(4). The ability for patients to legally combust or smoke dry cannabis was not enacted until May 2021 and did not become effective until March 1, 2022, after Torgerson's arrest. Act of May 21, 2021, ch. 30, art. 3, § 29, 2021 Minn. Laws 400, 461–62 (codified as amended at Minn. Stat. § 152.22, subd. 6 (2022)).

B.

Having reviewed the intricate legal landscape surrounding cannabis use and possession in Minnesota at the time of Torgerson's arrest, we consider the decisions—both from our court and others—that the parties claim bear on the probable cause issue here as it relates to the odor of marijuana.

The State cites a series of prior decisions for the proposition that the odor of marijuana, alone, is sufficient to support probable cause to search a vehicle under the automobile exception. These cases, however, do not reach as far as the State claims. The State argues that the *City of St. Paul v. Moody*, 244 N.W.2d 43, 44 (Minn. 1976) (per curiam) supports its argument that an odor alone can create probable cause. *Moody*, however, involved a phone call to police reporting suspicious behavior of people in an illegally parked car with heavily fogged windows. *Id*. When the passengers opened a door to talk to police, the officers smelled a strong odor of paint fumes and then searched the vehicle and found evidence of paint sniffing and a firearm. *Id.* We determined the strong odor of paint fumes created probable cause to believe the occupants had been sniffing paint. *Id.* Consequently, the circumstances informing the officer's probable cause determination consisted of considerably more than just the odor of paint fumes, including suspicious behavior by the vehicle's occupants and an illegally parked vehicle.[9]

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[9] Torgerson points out that most case law on whether the odor of marijuana creates probable cause (including *Moody*) is based on *State v. Wicklund*, 205 N.W.2d 509 (Minn. 1973) (per curiam), *superseded by statute*, Minn. Stat. § 152.15, subd. 2(4) (1976), *as recognized in State v. Ortega*, 770 N.W.2d 145, 149 n.2 (Minn. 2009). This court considered the impact that the odor of marijuana has in a probable cause determination in

The State next argues that *State v. Schultz*, 271 N.W.2d 836 (Minn. 1978) (per curiam), supports its argument that probable cause to search under the automobile exception can be supported solely by the odor of marijuana. We find this argument unpersuasive. The "sole issue" before our court in *Schultz* was whether the district court judge, acting as a fact finder at an omnibus hearing, resolved a factual dispute about evidence relating to the appellant's motion to suppress on Fourth Amendment grounds. *Id.* at 837. The officer claimed that he could smell marijuana while standing by the driver's window, and the marijuana was wrapped in plastic bags inside grocery bags placed on the floor by the passenger's feet. *Id.* Appellant admitted that the marijuana could be smelled through the plastic bags and grocery bags but denied that the marijuana's odor was detectible from where the officer was standing. *Id.*

Wicklund, but *Wicklund* involved a search of *a person* incident to arrest, not the search of an automobile. *See Wicklund*, 205 N.W.2d at 510–11 (holding officers had probable cause to search the defendant incident to arrest after a traffic stop of a slow-moving and erratically driven car with oddly-acting passengers engaged in furtive movements because the officers could smell the odor of marijuana emanating from the car and could see beer cans in the back seat). Also, as we clarified in *Ortega*, 770 N.W.2d at 149 n.2, *Wicklund* was superseded by statute; specifically, Minn. Stat. § 152.15, subd. 2(4) (1971) was amended in 1976 to provide that possession of a small amount of marijuana was only a petty misdemeanor. *Ortega*, 770 N.W.2d at 149 n.2. Like *Wickland*, *Ortega* is distinguishable from the present case because it involved the search of a person incident to arrest rather than a search under the automobile exception. *Id.* at 147–49; *see Chambers v. Maroney*, 399 U.S. 42, 49 (1970) (holding that "the search of an auto[mobile] on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest" because the right to search a vehicle is dependent not on cause to arrest, but on the reasonable cause the officer has to believe that the automobile has illegal contraband).

In other words, the disputed issue at the omnibus hearing was whether the officer was truthful when he testified that he smelled marijuana. *Id.* We stated, "[i]f he did, then the officer properly conducted a warrantless search of the passenger compartment for marijuana pursuant to the so-called motor vehicle exception to the warrant requirement." *Schultz*, 271 N.W.2d at 837 (citing *Wicklund*, 205 N.W.2d 509). We explained that "at a pretrial suppression hearing the trial court acts as finder of facts, deciding for purposes of admissibility which evidence to believe and whether the state has met its burden of proof." *Id.* (citation omitted) (internal quotation marks omitted). Although the district court did not think it was his function to act as a fact finder on the disputed issue, the district court *did* issue formal written findings after the omnibus hearing that resolved the disputed question about whether the officer was truthful, and "we [would] not go behind those findings," so we affirmed the appellant's conviction. *Id.*

Our per curiam opinion in *Schultz* did not decide the legitimacy of the district court's probable cause determination. Moreso, the opinion contained very few details about the factual circumstances surrounding the stop of appellant's vehicle. Our comment in *Schultz* about probable cause also relied on *Wicklund*, 205 N.W.2d 509, which we recognized as superseded by Minn. Stat. § 152.15, subd. 2(4) (1976), because possession of a small amount of marijuana was decriminalized. *See Ortega*, 770 N.W.2d at 149 n.2. Furthermore, as discussed in depth above, the legal framework surrounding marijuana has changed since 1978—both hemp and medical marijuana were legal at the time of Torgerson's arrest.

The State argues that *State v. Schinzing*, 342 N.W.2d 105 (Minn. 1983), supports its argument that the odor of marijuana, alone, creates probable cause to search because the odor of alcohol justified a search under the automobile exception. In *Schinzing*, an officer observed a vehicle driving erratically, stopped the vehicle, and determined the driver and passengers were under 21. *Id.* at 106–07. The officer smelled the odor of alcohol coming from inside the car and, when asked, the passengers admitted they drank alcohol. *Id.* at 107. The officer searched the vehicle for open containers, which he found with marijuana paraphernalia. *Id.* We determined the officer's search of the passenger compartment of the vehicle was supported by probable cause given the odor of alcohol emanating from the underage passengers and their admission to drinking. *Id.* at 109. *Schinzing* involved more than just the odor of alcohol in the circumstances contributing to the probable cause determination, including erratic driving and the passengers' admission to underage drinking.

Instead, we find *State v. Burbach*, 706 N.W.2d 484 (Minn. 2005), to be more instructive than the cases relied on by the State. In *Burbach*, we determined that the odor of alcohol emanating from an adult passenger at a traffic stop did not provide reasonable suspicion of an open-container violation that would allow expansion of a traffic stop. *Id.* at 489. In *Burbach*, the officer pulled the vehicle over for speeding and smelled alcohol, but the adult passenger claimed the alcohol odor came from him, and while the officer testified that the driver's nervousness suggested intoxication, the officer also determined that the driver did not smell of alcohol or show any other signs of intoxication. *Id.* at 486. The officer still requested and received consent to search the vehicle and found contraband.

Id. at 487. We explained that the officer's request for consent was an improper intrusion because it was not supported by reasonable articulable suspicion of additional criminal activity. *Id.* at 491. *Burbach* is helpful to our analysis here because it shows that reasonable suspicion—which requires a lesser showing than probable cause—did not exist when the only evidence of wrongdoing was the odor of alcohol. *See State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (explaining that the "reasonable suspicion standard is not high" and that the "standard is less demanding than probable cause" (citation omitted) (internal quotation marks omitted)).

Additionally, in *Burbach*, we clarified our holding in *Schinzing*, 342 N.W.2d 105. In *Burbach*, the State argued that the *Schinzing* holding articulated "a bright-line rule that the odor of alcohol always justifies a vehicle search." 706 N.W.2d at 489. We explained that the required constitutional analysis in these cases "must be 'individualized' and viewed under 'the totality of the circumstances' of each case." *Id.* So, the odor of alcohol in *Schinzing* had to be examined in the light of that particular context, which importantly included the underage passengers who could not legally drink alcohol. *Id.*

This review of relevant precedent confirms that the totality of the circumstances test utilized in a probable cause determination is meant to be applied anew in each case based on the unique circumstances present. *See, e.g.*, *Lester*, 874 N.W.2d at 771 ("Probable cause is an objective inquiry that depends on the totality of the circumstances *in each case*." (emphasis added)). The State essentially asks us to create a bright-line rule by holding that the odor of marijuana emanating from a vehicle, on its own, will *always* create the requisite probable cause to search a vehicle. Our precedent, however, shows that we have shied

away from bright-line rules regarding probable cause and we have never held that the odor of marijuana (or any other substance), alone, is sufficient to create the requisite probable cause to search a vehicle.

But nor do the rulings of the district court and court of appeals in this case in suppressing the evidence go so far as to draw a bright-line rule in the other direction that probable cause cannot exist if there is *any* legal explanation for the marijuana odor—a proposition that is inconsistent with our precedent. Instead, consistent with our precedent, the probable cause analysis calls for the odor of marijuana to be one of the circumstances considered as part of the totality of the circumstances in assessing whether there is a *fair probability* that *contraband* or *evidence of a crime* will be found in a particular place. *See State v. Carter*, 697 N.W.2d 199, 204–05 (Minn. 2005) ("When examining whether a search was supported by probable cause, the ultimate question is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place." (citation omitted) (internal quotation marks omitted)). Therefore, under our precedent, the odor of marijuana should be considered along with the totality of any 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. In other words, for probable cause to arise, the totality of the circumstances must give rise to a fair probability that the marijuana is being possessed or used in a criminally illegal manner, which, under the legal landscape set forth in part I.A. and at the time of the search here, means more than a small amount of marijuana, that is not hemp, and is not being used under the medical cannabis registry program.

This inquiry is consistent with and reinforced by the Colorado Supreme Court's 2016 decision in *People v. Zuniga*, 372 P.3d 1052, 1057 (Colo. 2016), in which it was asked to review what "role . . . the odor of marijuana can play in the totality of the circumstances test in light of the fact that possession of one ounce or less of marijuana is now allowed under Colorado law." In *Zuniga*, an officer pulled a vehicle with Iowa plates over, noted a heavy odor of marijuana upon approaching the vehicle, and observed that the two men in the car were overly nervous, sweating, and had delayed response times when answering questions; the men also gave inconsistent stories about why they were in Colorado; and a drug sniffing dog alerted that there may be drugs in the vehicle. *Id.* at 1054–55. The officer searched and found a duffel bag with a pound of marijuana in the vehicle. *Id.* at 1055. The Colorado law at issue, Amendment 64, provided that it was neither unlawful nor an offense under Colorado law for people over 21 to possess an ounce or less of marijuana, but it was criminal to knowingly possess more than one ounce of marijuana. *Id.* at 1057. Consequently, similar to the law in Minnesota, "Colorado law ma[de] certain marijuana-related activities lawful and others unlawful." *Id.* The Colorado Supreme Court explained that the odor of marijuana is properly included in a totality of the circumstances analysis "and the possibility of an innocent justification merely affects a fact's weight and persuasiveness, not its inclusion in the analysis." *Id.* at 1058.

We find the Colorado Supreme Court's analysis persuasive and in line with our precedent. Consequently, we hold that the odor of marijuana may be considered as part of the probable cause calculus. Specifically, the odor of marijuana is one of the circumstances in the totality of circumstances analysis that should be considered in determining if there

is a "fair probability" that contraband or evidence of a crime will be found in the location searched. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006).[10]

II.

We now apply this rule to Torgerson's case. The facts relating to the vehicle stop are undisputed, so we review de novo whether the totality of the circumstances established a fair probability that contraband or evidence of a crime would be found in Torgerson's vehicle. *See State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007) ("When the facts are not in dispute, our review is de novo, and we must determine whether the police articulated an adequate basis for the search or seizure at issue.").

It is undisputed that the only indication that evidence of a crime or contraband may be found in Torgerson's vehicle was the odor of marijuana emanating from the vehicle. The first officer testified that he "could smell a strong odor of burnt marijuana" emanating

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[10] An amicus brief filed by the ACLU cited to relevant data and studies that illustrate the reasons the odor of marijuana, alone, should not create probable cause to search, contrary to the dissent's contention. For example, according to the Minnesota Medical Cannabis Dashboard, the number of people permitted to possess medical cannabis is around 40,000 people, and that number is expected to double or triple. Data were also presented on the related but distinct issue of how often contraband or evidence of a crime is found in a motor vehicle when the odor of marijuana emanates from it. For example, a study reviewing traffic stops in Philadelphia, which analyzed 25,000 stops, revealed that the police documented an odor of marijuana in 3,300 of those stops, but only uncovered contraband in 9.4% of those cases. This study means the odor of marijuana only led to the discovery of any contraband 1 of 10 times and suggests that the smell of marijuana does not necessarily lead to a "fair probability" that a crime is occurring. Finally, the amicus brief noted that the probability that the odor of marijuana will lead to the discovery of contraband or evidence of crime is further lessened by the fact that cannabidiol (CBD) cigarettes also produce the odor of burnt cannabis and can be legally possessed.

from the vehicle, that he could not smell the odor before approaching the vehicle, and that the odor's strength ranked as a five on a scale of one to ten. The second officer testified that he "could immediately [smell] the odor of marijuana coming from inside the vehicle," the odor "was strong enough that [he] immediately recognized it when [he] got to the window," and that the odor "definitely wasn't the faintest" marijuana odor he had ever smelled, but "it definitely wasn't the strongest." Neither officer articulated any other circumstance contributing to their probable cause analysis. There was nothing in Torgerson's actions to give suspicion that he was under the influence while driving, no drug paraphernalia or other evidence to indicate that the marijuana was being used in a manner, or was of such a quantity, so as to be criminally illegal, and no evidence showing that any use was not for legal medicinal purposes. In the absence of any other evidence as part of the totality of the circumstances analysis, the evidence of the medium-strength odor of marijuana, on its own, is insufficient to establish a fair probability that the search would yield evidence of criminally illegal drug-related contraband or conduct.

In this case, the officers relied solely on the medium-strength odor of marijuana when determining there was a fair probability that contraband or evidence of a crime would be found in Torgerson's vehicle—the very bright-line rule for probable cause advanced by the State and which we have rejected. Accordingly, we affirm the court of appeals decision that the district court properly suppressed the evidence obtained as result of the search of Torgerson's vehicle.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

D I S S E N T

GILDEA, Chief Justice (dissenting).

The question in this case is whether there was probable cause to search Adam Lloyd Torgerson's car after the police officers noticed the odor of marijuana emanating from the car. "Probable cause exists when there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.' " *Onyelobi v. State*, 932 N.W.2d 272, 281 (Minn. 2019) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This is not a high standard. *See State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999) ("The evidence necessary to support a finding of probable cause is significantly less than that required to support a conviction."). It does not require certainty or even a preponderance of the evidence. *See Florida v. Harris*, 568 U.S. 237, 243–44 (2013). Rather, fair probability is a " 'common-sense, nontechnical concept' that involves 'the factual and practical considerations of everyday life.' " *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quoting *State v. Lee*, 585 N.W.2d 378, 382 (Minn. 1998)). Applying that common-sense standard here, I conclude there was probable cause for the police to search Torgerson's car. Accordingly, I dissent.

The majority agrees that the odor of marijuana may be considered in determining whether there is a fair probability that contraband or evidence of a crime will be found in a motor vehicle. *Supra* at 17-19. But according to the majority, such an odor *by itself* fails to establish a fair probability that contraband or evidence of a crime will be found in a vehicle. *Supra* at 20. I disagree.

When the officers searched Torgerson's vehicle on July 5, 2021, possession of certain amounts of marijuana by certain people was a crime. *See generally* Minn. Stat. ch. 152 (2022); *supra* at 9–11. And except for people with medical authorization, possession of all marijuana was prohibited by statute. *See* Minn. Stat. § 609.02, subd. 4a (2022) (" 'Petty misdemeanor' means a petty offense which is prohibited by statute, which does not constitute a crime."); Minn. Stat. § 152.027, subd. 4(a) (making unlawful possession of "a small amount of marijuana" a petty misdemeanor); *id.*, subd. 3 (making it a misdemeanor to have more than 1.4 grams of marijuana "within the area of the vehicle normally occupied by the driver or passengers"); Minn. Stat. § 152.01, subd. 16 (defining "small amount" of marijuana as 42.5 grams or less); *see Robinson v. State*, 152 A.3d 661, 680 (Md. 2017) ("Decriminalization is not the same as legalization."). Thus, all marijuana—except for medical marijuana—was contraband. *Robinson*, 152 A.3d at 682 (" '[C]ontraband' means goods that are illegal to possess, regardless of whether possession of the goods is a crime."). Because marijuana is contraband in Minnesota, the smell of marijuana coming from inside a car would lead a reasonable and prudent person considering the factual and practical considerations of everyday life to conclude that there likely will be marijuana in the car. Accordingly, there was probable cause to search the car.

Other courts have recognized this common-sense application of the probable cause standard. For example, the Wisconsin Supreme Court, in *State v. Secrist*, explained that "a common sense conclusion when an officer smells the odor of a controlled substance is that a crime has *probably* been committed." 589 N.W.2d 387, 394 (Wis. 1999) (emphasis

added). That court recently reaffirmed the conclusion in *State v. Moore*, 991 N.W.2d 412, 417 (Wis. 2023), rejecting the defendant's argument that "the odor of marijuana cannot be unmistakable when there are innocent explanations for it—such as the odor of CBD, a legal substance that [the defendant] stated his vape pen was used for." The Ohio Supreme Court reached a similar conclusion in *State v. Moore*, 734 N.E.2d 804, 808 (Ohio 2000), explaining that "if the smell of marijuana, as detected by a person who is qualified to recognize the odor, is the sole circumstance, this is sufficient to establish probable cause." The Wyoming Supreme Court has also concluded that the odor of burnt marijuana by itself establishes probable cause to search a motor vehicle. *Ray v. State*, 432 P.3d 872, 878 (Wyo. 2018). Finally, the rule is the same in the federal courts. *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998) ("The smell of burnt marijuana would lead a person of ordinary caution to believe the passenger compartment might contain marijuana." (quoting *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993))); *see United States v. Williams*, 955 F.3d 734, 737 (8th Cir. 2020) ("We have repeatedly held that the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception."); *United States v. Smith*, 789 F.3d 923, 929 (8th Cir. 2015) (declining to "distinguish between a faint smell and a strong smell in determining whether the marijuana odor is enough to prolong a stop"); *United States v. Wald*, 216 F.3d 1222, 1226 (10th Cir. 2000) (noting "the common-sense proposition that the smell of burnt marijuana is indicative of drug usage").

Moreover, even accepting the majority's premise that possession of some amount of marijuana was legal, the Fourth Amendment does not require a police officer to know

with certainty that the vehicle contains an illegal amount of marijuana. Instead, it simply requires a fair probability that the car contains an illegal amount of marijuana, or evidence of an illegal amount of marijuana. The Supreme Court has rejected efforts to attach "some general, numerically precise degree of certainty" to probable cause. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). The required analysis "does not deal with hard certainties, but with *probabilities*." *Id.* at 231 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)) (emphasis added). Our analysis should not include " '[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence;' " all that is required is a " 'fair probability.' " *Florida v. Harris*, 568 U.S. 237, 243–44 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 238 (1983)); *State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999) ("The evidence necessary to support a finding of probable cause is significantly less than that required to support a conviction."). In other words, the inquiry is not whether it was more likely than not that Torgerson had illegal marijuana in his vehicle, the inquiry is whether—after noticing the smell of marijuana coming from the vehicle on both the driver's and passenger's sides—a reasonable person would conclude that there was a fair probability that there was an illegal amount of marijuana in the vehicle. I would conclude that there is.

In sum, the smell of burnt marijuana suggests that someone smoked marijuana in the car. Common sense tells us that when a person has recently smoked marijuana in their car, there is a fair chance that more marijuana for personal use will be in the car.[1] *See State*

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[1] The majority relies on *State v. Burbach*, 706 N.W.2d 484, 489 (Minn. 2005). We said there that "[t]o allow a vehicle search solely because an adult passenger smelled of

v. Johnson, 444 N.W.2d 824, 826 (Minn. 1989) (stating that "innocent activity might justify the suspicion of criminal activity"). Under the marijuana laws at the time that Torgerson was pulled over, there was a fair probability that an illegal amount of marijuana, or evidence of an illegal amount of marijuana, would be found in a vehicle from which police officers detected the odor of burnt marijuana. For the foregoing reasons, I dissent.

ANDERSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.

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alcohol would be to permit highly speculative searches against a large group of entirely law-abiding motorists, including designated drivers." *Burbach* is not helpful here because the police ruled out the driver as the source of the alcohol smell and the passenger in the car admitted to drinking alcohol *elsewhere* and then getting in the car. Here, the information the police had suggests that someone smoked marijuana while in the car.