

**FILED**

November 17, 2023

**OFFICE OF  
APPELLATE COURTS**

A22-1296

STATE OF MINNESOTA  
IN COURT OF APPEALS

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STATE OF MINNESOTA,

Respondent,

vs.

JACOB RICHARD LINDEKUGEL,

Appellant.

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**RESPONDENT'S INFORMAL SUPPLEMENTAL BRIEF**

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## RELEVANT PROCEDURAL BACKGROUND

On July 3, 2023, this Court issued a decision in this appeal that affirmed the district court's denial of Appellant's motion to suppress. On August 1, Appellant filed a petition for further review with the Minnesota Supreme Court.

On September 13, the supreme court issued its decision in *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023). Then, on October 17, the supreme court issued an order in this appeal that granted Appellant's petition for review, vacated a portion of this Court's July 3<sup>rd</sup> decision, and remanded the appeal to this Court "for reconsideration in light of *State v. Torgerson*["] The following week, on October 24, this Court reinstated this appeal and ordered "informal briefs limited to addressing the impact of *State v. Torgerson* on this [C]ourt's analysis."

## SUPPLEMENTAL ARGUMENT

In *Torgerson*, the supreme court explained, in both its first syllabus point and in the holding of the opinion, that "[t]he 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." 995 N.W.2d at 165, 174. But this Court already applied the totality-of-the-circumstances analysis that *Torgerson* compels. In its July 3<sup>rd</sup> decision, this Court determined, as an alternative holding, that:

[T]he officer had probable cause to search [Appellant's] vehicle under the totality of the circumstances. The officer saw an occupied truck, with its interior lights on, "straddling [two] parking lanes" after bar close in a high-crime area. When the officer approached the truck, he saw [Appellant] hide a short "glass or plastic clear thing" which

appeared to be a smoking device. The officer also observed that [Appellant] was exhibiting signs of impairment —namely, slow and slurred speech. Finally, the officer saw what appeared to be plastic baggies on the floor beneath the passenger's seat and observed that one of the baggies appeared to contain marijuana. Based on these facts and circumstances, the district court did not err by concluding that the officer had probable cause to search [Appellant's] vehicle. *See [State v.] Lester*, 874 N.W.2d [768,] 771 [(Minn. 2016)].

*State v. Lindekugel*, No. A22-1296, 2023 WL 4307726, \*6 (Minn. App. July 3, 2023) (footnote omitted).

Although this portion of this Court's opinion is located in the section of the opinion (section II) that the supreme court vacated in its October 17<sup>th</sup> order, everything that this Court wrote in that quoted portion is completely consistent with the supreme court's subsequent decision in *Torgerson*. In fact, the only thing missing from the totality-of-the-circumstances analysis quoted above is there is no mention of the odor of marijuana that Officer Loughrey smelled as soon as Appellant first rolled down the window to the vehicle. T. 33-35; App. Add. 3.<sup>1</sup> *Torgerson* expressly establishes that fact – the odor of marinara– “should be considered” when a court evaluates the totality of all the circumstances. 995 N.W.2d at 165, 174. Thus, the odor that Officer Loughrey detected emanating from the vehicle is another circumstance – in addition to those described above – that

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<sup>1</sup> “T.” refers to the transcript of the *Rasmussen* evidentiary hearing held on February 15, 2022. “App. Add.” refers to the addendum to Appellant's original, principal brief, which contained the district court's 19-page *Rasmussen* Order and Memorandum, issued on April 20, 2022.

supports the existence of probable cause that evidence of a crime would be located in the vehicle.

In his supplemental brief, Appellant tries to undermine this Court's previous totality-of-the-circumstances analysis in three ways. *See* Appellant's November 2, 2023 Informal Supplemental Brief ("App. Supp. Br.") 3-5. None of them hold any water.

First, Appellant claims that this Court's observation that "the officer saw what appeared to be plastic baggies on the floor beneath the passenger's seat and observed that one of the baggies appeared to contain marijuana" (2023 WL 4307726, \*6) violated *Torgerson* because "[c]annabis will not always contribute to probable cause." App. Supp. Br. 3. But, at the time this happened in July 2021, possessing any more than 1.4 grams of marijuana in a motor vehicle – which is much, much less than a "small amount"<sup>2</sup> – constituted a criminal misdemeanor offense. *See* Minn. Stat. § 152.027, subd. 3 (2021). Thus, it was very appropriate for this Court to treat Officer Loughrey's plain-view observation of what appeared to be marijuana as contributing to probable cause of contraband or evidence of a crime.

Second, Appellant claims that this Court did not appropriately weigh his assertions that the THC cartridges in his vehicle were for medical-marijuana purposes. App. Supp. Br. 4. But this Court did not cite the THC cartridges as contributing to probable cause in any way. *See* 2023 WL 4307726, \*6. Rather, the

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<sup>2</sup> *See* Minn. Stat. 152.01, subd. 16 ("Small amount' as applied to marijuana means 42.5 grams or less.").

circumstances supporting probable cause included: occupied truck with its lights on, straddling two parking lanes, after bar close, high-crime area, Officer Loughrey seeing Appellant hide what appeared to be a glass or clear plastic smoking device when the officer approached the vehicle, the officer seeing what looked like a clear plastic baggie containing marijuana on the floor of the vehicle, and signs of impairment. In light of all these circumstances, any innocent activity of legally possessing the THC cartridges would not have controlled law enforcement's conduct. *Cf. State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989) (stating "innocent activity might justify the suspicion of criminal activity").

Third and finally, Appellant emphasizes that this Court should "assess the circumstances at the time of the search, and not information or fruits arising from the search." App. Supp. Br. 4. But Officer Loughrey testified about what he thought he saw Appellant handling when he first approached the vehicle (without any reference to what was later found in the vehicle), as follows:

I initially saw [Appellant] – appeared to be something in his left hand, appeared to be a short – maybe a glass or plastic clear thing in his hand, and he appeared to put it behind his back once he observed – once he saw me show up to his car, and then I saw him reaching around, fumbling around[.]

T. 33; *see State v. Lembke*, 509 N.W.2d 182, 184 (Minn. App. 1993) (stating that the incriminating nature of a plastic bag was apparent because even though "[a] bag has many legitimate uses.... [a]n officer may ... rely on trained intuition and observations drawn from his experience"); *State v. Munoz*, 385 N.W.2d 373, 376 (Minn. App. 1986) ("Furtive gestures can provide a basis for probable cause.");

*State v. Hodgman*, 257 N.W.2d 313, 314 (Minn. 1977) (stating that the observation of “a plastic pill bottle” supported the determination of probable cause). The totality of the circumstances – including the odor of marijuana – at the time of the search supported probable cause for the search.

### CONCLUSION

The State respectfully asks this Court to, consistent with *Torgerson*, 995 N.W.2d at 165, 174, and consistent with this Court’s previous alternative holding in this appeal, affirm the denial of Appellant’s motion to suppress.

DATED: November 17, 2023

Respectfully submitted,

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**CERTIFICATION OF BRIEF  
LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,175 words. This brief was prepared using Microsoft Office 2016, Times New Roman font face size 13.



Dated: November 17, 2023

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